Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DOUGLAS JONES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD;
UNITED STATES ENRICHMENT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the *McDonnell Douglas* pretext analysis used in Title VII and other civil rights cases, in which the burden of disproving the employer's proffered justification lies at all times with the plaintiff, may be utilized in nuclear whistleblower actions brought under Section 211 of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 (as amended in 1992), which expressly provides that the final burden of proof lies with the employer to "demonstrate by clear and convincing evidence" that it would have taken adverse action against the employee even absent his protected activity.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner – Douglas Jones

Petitioner, Douglas Jones, is an individual.

Respondents – United States Department of Labor, Administrative Review Board; and

United States Enrichment Corporation

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Douglas Jones, respectfully petitions this Court for a writ of certiorari to review the erroneous opinion of the United States Court of Appeals for the Sixth Circuit, Case No. 04-3729, dated September 8, 2005. The circuit court's opinion upheld the Final Decision of the U.S. Department of Labor's Administrative Review Board, which relied on the traditional *McDonnell Douglas* framework to dismiss claims brought by Jones against Respondent United States Enrichment Corporation under the nuclear whistleblower protections found in Section 211 of the Energy Reorganization Act.

This case involves a question of exceptional public importance in which the decision of the circuit court conflicts with the explicit language of statutory amendments enacted in 1992 and authoritative decisions of other United States Circuit Courts of Appeals. Other circuits have expressly held that, because "Congress desired to make it easier for whistleblowers to prevail in their discrimination suits," the 1992 amendments establish "a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas*." *Trimmer v. United States DOL*, 174 F.3d 1098, 1101 (10th Cir. 1999); *see also, Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997); *Williams v. Administrative Review Bd.*, 376 F.3d 471, 476 (5th Cir. 2004).

OPINIONS BELOW

On September 8, 2005, the United States Court of Appeals for the Sixth Circuit issued its opinion [Pet. App. at 3a] affirming the Final Decision of the Department of Labor's

Administrative Review Board dated April 30, 2004 [Pet. App. at 18a]. The Review Board dismissed the nuclear whistleblower claims brought by the Petitioner, Douglas Jones, against Respondent United States Enrichment Corporation (USEC) under Section 211 of the Energy Reorganization Act.

With its dismissal of Jones' claims, the Review Board overturned a Recommended Decision and Order, dated June 21, 2002, issued by the Department's Administrative Law Judge who presided over the hearing and who found, based on determinations of witness credibility, that Respondent USEC had terminated Jones' employment and otherwise retaliated against Jones because of his protected nuclear whistleblower activity. [Pet. App. at 61a.]

The circuit court's opinion is unofficially reported at 148 Fed. Appx. 490; 2005 U.S. App. LEXIS 19543. The circuit court's order of January 10, 2006, denying Jones' petition for rehearing *en banc* [Pet. App. at 1a], is unreported. The Review Board and ALJ decisions appear on the Department of Labor's web site – http://www.oalj.dol.gov/.

JURISDICTION

The certiorari jurisdiction of this Court is invoked in conformity with 28 U.S.C. § 1254(1). The United States Court of Appeals for the Sixth Circuit issued its opinion on September 8, 2005, and issued its decision denying Jones' petition for rehearing *en banc* on January 10, 2006.

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Section 211 of the Energy Reorganization Act, as amended in 1992, are set forth below:

(a) Discrimination against employee.

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or

in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

* * * * *

(b) Complaint, filing and notification.

(3) (C) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

42 U.S.C. § 5851.

STATEMENT OF THE CASE

On January 17, 2001, Petitioner Douglas Jones filed a complaint against his former employer, Respondent U.S. Enrichment Corporation (USEC), with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). Jones' complaint alleged that USEC had terminated his employment and taken other retaliatory action against him in violation of the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851 and its implementing regulations at 29 CFR Part 24. Jones' complaint was heard by the DOL's Administrative Law

Judge, who issued a Recommended Decision upholding Jones' complaint. The ALJ's decision was reversed by the DOL's Administrative Review Board, who was acting in the capacity of the Secretary of Labor's designee.

The circuit court had jurisdiction to hear this matter pursuant to 42 U.S.C. § 5851(c)(1), and FRAP 15, which authorize any person adversely affected by a final decision of the Secretary of Labor to file a petition for review in circuit court. A timely petition for review was filed by the Petitioner, Douglas Jones, within sixty days following the Review Board's Final Decision.

1. Decision of the Administrative Law Judge.

After a two-day hearing at which the ALJ had the opportunity to observe first hand the testimony of the two key witnesses in this matter (Jones and USEC manager Russell Starkey), the ALJ found that Respondent USEC had discriminated against Petitioner Douglas Jones because of his protected activity, in violation of the whistleblower protections in Section 211 of the Energy Reorganization Act, 42 U.S.C. §5851. [R. 31, ALJ Decision pp. 43-50 (June 21, 2002), Pet. App. at 136a-149a] Accordingly, the ALJ ruled in favor of Jones and awarded him the relief to which he was entitled under the statute.

Specifically, the ALJ found as follows:

A. That, during his employment by USEC, Jones engaged in multiple instances of protected whistleblower activity, of which USEC had knowledge, relating to inadequate training of employees and subcontractors on the operation of heavy equipment used to transport

hazardous nuclear material [R. 31, ALJ Decision, p. 32, Pet. App. at 118a];

B. That Jones suffered multiple adverse actions, culminating in his being subjected to an involuntary layoff process that was manipulated to assure his termination from employment [R. 31, ALJ Decision, p. 33, Pet. App. at 118a-119a];

C. That Jones met his burden of establishing by a preponderance of the evidence that his protected nuclear whistleblower activity was "a contributing factor" in USEC's adverse actions against him, including his selection for a July 2000 Involuntary Reduction in Force (IRIF) [R. 31, ALJ Decision, p. 29-30, 35, Pet. App. at 110a-111a, 121a]; and

D. That USEC failed to satisfy its burden of proving by clear and convincing evidence that it would have taken its adverse actions against Jones even absent his protected activity [R. 31, ALJ Decision, pp. 35-42, Pet. App. at 121a-136a].[1]

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[1] In reaching his decision, the ALJ repeatedly relied on his own credibility determinations concerning the two chief witnesses: Petitioner Douglas Jones and his Manager, Russ Starkey. The ALJ rejected the testimony of Starkey and credited the testimony of Jones on a number of key factual issues relating directly to USEC's discriminatory intent and the credence to be given to USEC's stated reasons for its actions:

- On the issue of whether USEC made training materials available to Jones, the ALJ stated that he "credited" the testimony of Jones over that of Starkey. [R. 31, ALJ

Decision, p. 7, p. 8, n.10, Pet. App. at 71a, 73a, n.10]

- On the issue of management's response to Jones' incident reports and whether Starkey's e-mail messages to Jones were sarcastic, less than serious, and even inane, the ALJ stated that he once again "credited" the testimony of Jones over Starkey. [Id., p. 10, Pet. App. at 77a] "I credit this testimony of Mr. Jones as a universal response of USEC management when he raised an issue." [Id.]

- On the allocation of blame for the delay in development of a key training program for Mobile Industrial Equipment (MIE), the ALJ stated that he "discredited" Starkey's testimony. [Id., p. 11, Pet. App. at 79a.]

- On the critical issue of USEC's evaluation of employees' "competencies" in order to select employees for the IRIF, the ALJ stated as follows:

  "I credit and give great weight to Mr. Jones comparison of the 'Competencies' to the scheduled evaluation ratings, and otherwise give his testimony great weight. I give little weight to the testimony of Mr. Starkey on these points, based upon my preceding determinations regarding his testimony ..."

  [R. 31, ALJ Decision, pp. 22-23, Pet. App. at 100a]

- On Starkey's contention that the person selected to take Jones' position after the IRIF had demonstrated "superior performance."

  [R. 31, ALJ Decision, p. 24, Pet. App. at 102a.]

Moreover, the ALJ made explicit findings about Jones' demeanor on the stand. When discussing Jones' testimony regarding his damages, the ALJ wrote that "I have observed his forthrightness, his consistency, and demeanor throughout the trial, and I credit his testimony . . ." [R. 31, ALJ Decision, p. 47, ¶ 5, Pet. App. at 144a]

2. Final Decision of the Administrative Review Board.

The Department of Labor's Administrative Review Board dismissed Jones' complaint because he had purportedly failed to prove that USEC's proffered reasons for its adverse actions against him were "pretextual" – i.e. because he had purportedly failed to satisfy the third stage of the *McDonnell Douglas* analysis utilized in cases brought under Title VII of the Civil Rights Act of 1964. [R. 64, Review Board Final Decision, pp. 16-17, Pet. App. at 46a] As stated by the Review Board:

> Therefore, in determining whether Jones demonstrated that his protected activity was a contributing factor in USEC's decision to terminate his employment, we apply the established and familiar Title VII methodology wherein after the complainant has established a prima facie case and the employer has rebutted it, the complainant attempts to prove that the employer's reason for the adverse action is a pretext.

[R. 64, Review Board Final Decision, p. 7, Pet. App. at 29a-30a (emphasis added).] Indeed, the Review Board's rejection of Jones' evidence is all contained in a five-part section entitled "Pretext Analysis." [R. 64, Review Board Final Decision ("Pretext Analysis"), pp. 8-16, Pet. App. at 31a-45a] "We conclude . . . that Jones has not shown that USEC's proffered reason was a pretext for discrimination." [R. 64, Review Board Final Decision, p. 8, Pet. App. at 30a.]

In its conclusion, the Review Board indicated once again that it was placing the Title VII "pretext" burden on the Petitioner, citing *St. Mary's Honor Center v Hicks*, 509 U.S.

502, 519 [1993]. [R. 64, Review Board Final Decision, p. 17, Pet. App. at 46a.][2]

3. Decision of the Circuit Court.

The circuit court affirmed the Final Decision of the Review Board. Although the court gave passing mention to the fact that nuclear whistleblower actions are governed by different burdens of proof than Title VII actions, the court was dismissive of Jones' arguments and proceeded to reaffirm both the Review Board's Final Decision and its analysis:

> Jones next argues that the Board erred by applying the *McDonnell Douglas* burden-shifting framework to his claim. . . . But . . . Jones has not shown that a "pretext analysis" adversely affected his case or precisely how the use of pretext is incompatible with the burden-shifting standard for these types of claims. Substantial evidence, at any rate, supports the Board's ultimate conclusion that Jones failed to establish by a preponderance of the evidence that retaliation contributed to his discharge, making this alleged error at most a harmless one.

[Circuit Court Decision, pg. 8 of 16, Pet. App. at 9a-10a.] The court followed its brief discussion of the applicable legal standard with a five-part analysis of the factual record that mirrored the Review Board's own five-part "pretext analysis." [Compare, Circuit Court Decision, pgs 8-16 with

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[2] The Review Board also concluded that it did not owe deference to the ALJ's credibility determinations, stating incorrectly that "the ALJ did not base this credibility determination on demeanor." [R. 64, Review Board Final Decision, p. 5, Pet. App. at 25a.]

R. 64, Review Board Final Decision, pgs 8-17 ("Pretext Analysis"), Pet. App. at 10a-17a and 31a-45a][3]

Finally, the court imposed a "heightened burden of proof" on Jones because he challenged his selection for an IRIF, citing *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir.1990), a case under the Age Discrimination in Employment Act. [Circuit Court Decision, pg 15 of 16, Pet. App. at 17a.]

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[3] On the issue of deference to the ALJ's determinations on witness credibility, the court stated as follows:

> In the present case, the ALJ's evaluation of Starkey and Jones, the only two witnesses to testify, does not mandate broad deference to all of the ALJ's findings. . . . And that is particularly so here because the case does not turn on witness credibility alone, see [W.F.] Bolin [v. NLRB, 70 F.3d 863,] 872-73 [6th Cir. 1995], and because the ALJ's credibility rulings do not purport to address all of the witnesses' testimony or dispose of all of the issues in the case . . .

[Circuit Court Decision, pg. 6 of 16 (citations omitted) Pet. App. at 8a.]

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RECTIFY THE CIRCUIT COURT'S DEPARTURE FROM AUTHORITATIVE PRECEDENT IN OTHER CIRCUITS CONCERNING THE EVIDENTIARY BURDENS ESTABLISHED BY THE 1992 AMENDMENTS TO SECTION 211 OF THE ENERGY REORGANIZATION ACT

This case presents an important issue of first impression for this Court – the impact of Congress' 1992 amendments to the nuclear whistleblower protections in Section 211 of the Energy Reorganization Act (ERA). 42 U.S.C. § 5851. The construction given to these amendments by this Court will have an enormous impact on the rights of whistleblowers in the nuclear industry and, more particularly, their ability to defend themselves from retaliation by their employers.

A. Background on 1992 Amendments

In 1992, Congress changed the burdens of proof for the employee and the employer in a nuclear whistleblower action. 42 U.S.C. § 5851(b)(3)(C) and (D). As stated by the Eleventh Circuit, the purpose of the amendments was to address the whistleblower harassment and retaliation that Congress found to "remain all too common in parts of the nuclear industry." *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (quoting H. Rep. No. 102-474(VIII), at 79 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 2282, 2297). The Tenth Circuit has noted that, with the 1992 amendments, "Congress desired to make it easier for whistleblowers to prevail in their discrimination suits." *Trimmer v. United States DOL*, 174 F.3d 1098, 1101 (10th

Cir. 1999). "For employers, this is a tough standard, and not by accident." *Stone & Webster*, 115 F.3d at 1572. "Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves." Id.; *see also Williams v. Administrative Review Bd.*, 376 F.3d 471, 476 (5th Cir. 2004) (recognizing new burdens of proof).

B. As Held by Other Circuit Courts of Appeals, The Parties' Burdens of Proof Under Section 211 of the ERA Differ Markedly from a Title VII Action

When Congress amended the ERA in 1992, it intentionally and expressly adopted new standards of proof in whistleblower discrimination cases, distinct from those applicable to Title VII and other civil rights statutes. The amendments deliberately impose a tough standard on employers in order to make it easier for whistleblowers to prevail.

"[P]rior to 1992, the Secretary consistently utilized the burden shifting taxonomy for ERA retaliation actions set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Doyle v. United States Sec'y of Labor*, 285 F.3d 243, 250 (3d Cir. 2002) (citations omitted). "[E]ven though the Supreme Court never ruled on the point, a number of other courts of appeals followed course by applying the burdens of proof and production originally created to address actions arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.,. . ." *Id.* (citations omitted).

Under the *McDonnell Douglas* framework, the plaintiff in a Title VII case always bears the burden of proving that the protected classification (race, gender, etc.) was "a determining and motivating factor" in the employer's adverse

action – and must do so by disproving each of the employer's proffered justifications for its adverse actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000). Stated differently, the plaintiff bears the burden of proving that each of the employer's stated reasons for its actions is "pretextual." "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Center v Hicks*, 509 U.S. 502, 518 (1993), *quoting Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

However, "[i]n 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas*." *Trimmer*, 174 F.3d at 1101 (emphasis added). "Section 5851 is clear and supplies its own free-standing evidentiary framework." *Stone & Webster*, 115 F.3d at 1572.[4]

Under the 1992 amendments, the complainant must demonstrate (a) that he engaged in protected activity, (b) that he suffered an adverse employment action, and (c) that the protected activity was "a contributing factor" in the adverse

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[4] Congress retained the concept of a "*prima facie* showing" in its 1992 amendments to the ERA, but only applied it to the Secretary's initial decision to investigate. As amended, Section 211 contains a "gatekeeping" function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a "prima facie showing" that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. See 42 U.S.C. § 5851(b)(3)(A). But once, as in this case, the Secretary has decided to investigate a complaint, the *prima facie* showing framework is no longer applicable and has no role whatsoever in the parties' burdens of proof at the administrative hearing.

employment action. 42 U.S.C. 5851(b)(3)(C). The standard of proof applicable to the complainant's burden is a "preponderance of the evidence." *Dysert v. United States Secy. of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997), *accord, Trimmer*, 174 F.3d at 1101-02; *Williams v. Admin. Review Bd.*, 376 F.3d 471 (5th Cir. 2004).

Once a complainant meets this burden, the employer may only avoid liability if it demonstrates by "clear and convincing evidence" that it would have taken the same adverse employment action even in the absence of the protected activity. 42 U.S.C. § 5851(b)(3)(D).

The new framework differs from *McDonnell Douglas* in two critical respects. First, the complainant in an ERA case need not demonstrate that his protected activity was "a determining and motivating factor" – only that is was "a contributing factor" in the employer's decision to take adverse action.[5] Second, it places the final burden of proof squarely

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[5] The Petitioner has not found an authoritative definition for the term "a contributing factor." However, a Seventh Circuit opinion written by Judge Richard Posner defines a similar term – "a motivating factor" – in the context of claims for first amendment retaliation under the framework set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977):

> But what exactly is a "motivating factor"? The cases, beginning with *Mt. Healthy*, tend to treat the term as if it were self-evident. Perhaps it is, but some amplification may be helpful.
>
> A motivating factor is a factor that weighs in the defendant's decision to take the action complained of – in other words, it is a consideration present to his mind that favors, that pushes him toward, the action. *See Boyd v. Illinois State Police*, 384 F.3d 888, 895 (7th Cir. 2004); *Ostad v. Oregon Health Sciences*

on the employer, who must prove "by clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of such activity. 42 U.S.C. § 5851(b)(3)(D).[6]

University, 327 F.3d 876, 884-85 (9th Cir. 2003); *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 795 (3d Cir. 2000). It is "a," not necessarily "the," reason that he takes the action. Its precise weight in his decision is not important.

Hasan v. United States Dept of Labor, 400 F.3d 1001, 1006 (7th Cir. 2005), *cert. denied sub nom. Harris v. Smith*, 126 S. Ct. 1161, 163 L. Ed. 2d 1015 (2006) (emphasis added).

[6] Congress' imposition of the heightened "clear and convincing evidence" standard on the employer in an ERA case is highly significant. "Clear and convincing evidence" is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003), *citing Addington v. Texas*, 441 U.S. 418, 425 (1979). The purpose of the clear and convincing evidence standard is "to reduce the chances of inappropriate decisions" and is no less meaningful when the factfinder is a judge, rather than a jury. *Washington v. Harper*, 494 U.S. 210, 255, n. 28 (1990). Clear and convincing evidence is required where the interests of the opposing party – in this case, the interest of the Petitioner in being free from retaliatory action because of his protected activity – are deemed to be "truly substantial" and "particularly important." *Sawyer v. Whitley*, 505 U.S. 333, 365 (1992) (Stevens, J., dissenting); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). As stated in *Addington*, "[t]he function of a standard of proof . . . is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington*, 441 U.S. at 425. By informing the factfinder in this manner, the standard of proof allocates the risk of erroneous judgment between the litigants and indicates the relative importance society attaches to the interests that are at stake. *Colorado v. New Mexico*, 467 U.S. 310, 315-316 (1984).

C. The Review Board Ignored the Statutory Burden of Proof Under the 1992 Amendments

The Review Board's Decision evidences no recognition that the 1992 amendments to the ERA established a new evidentiary framework in order "to make it easier for whistleblowers to prevail in their discrimination suits." *Trimmer*, 174 F.3d at 1101. There is no recognition that Congress intentionally set a new evidentiary standard for ERA whistleblower actions and that "[f]or employers, this is a tough standard, and not by accident." *Stone & Webster Eng. Corp.*, 115 F.3d at 1572.

Instead, the Review Board repeatedly cites *St. Mary's Honor Center*, *supra*, and holds Jones to the final burden of proof traditionally applied in Title VII cases. Instead of requiring Jones to prove only that his protected activity was "a contributing factor" in his termination, the Review Board rejects Jones' claims because he has not disproved each and every justification offered by USEC for its actions – a standard borrowed from the final (pretext) stage of the *McDonnell Douglas* framework. Indeed, the Review Board's rejection of Jones' evidence is all contained in a section entitled "Pretext Analysis." [R. 64, Review Board Final Decision, p. 8, Pet. App. at 31a.]

For example, the Review Board rejected Jones' proof, and the ALJ's finding, that manager Russ Starkey placed Ed Craven in Jones' MIE program as soon as he learned of the upcoming layoff (IRIF) in order to facilitate Jones' termination because Jones purportedly failed to disprove USEC's contention that the announcement of the IRIF and the reassignment of Craven were "merely coincidental." [R. 64, Review Board Final Decision, p. 10, Pet. App. at 35a.] The Review Board rejected Jones' proof, and the ALJ's finding,

that he was given a poor mid-year evaluation because of his protected activity because Jones purportedly failed to disprove USEC's contention that he was not meeting management's subjective expectations. [R. 64, Review Board Final Decision, p. 11, Pet. App. at 37a.] The Review Board rejected Jones' proof, and the ALJ's finding, that Jones' supervisor, Danny Bucy, became hostile towards him because of his safety reports because Jones purportedly failed to disprove USEC's contention that Bucy was just unhappy about his added responsibilities. [R. 64, Review Board Final Decision, p. 13, Pet. App. at 39a.] Finally, the Review Board rejected Jones' proof, and the ALJ's finding, that he was poorly rated on his RIF evaluation even though it agreed that Jones' was unfairly rated in two "competencies." [R.64, Review Board Final Decision, p. 16, Pet. App. at 45a.]

The only burden imposed by the Review Board on USEC was the burden to "merely articulate a legitimate reason for terminating Jones" – a standard that, even under *McDonnell Douglas*, is only applied at the summary judgment stage. [R. 64, Review Board Final Decision, p. 6, Pet. App. at 27a.] Despite the abundant evidence of record cited by the ALJ, the Review Board never required USEC to meet the burden placed on it by Section 211 – namely to demonstrate by clear and convincing evidence that it would have terminated Jones even in the absence of his protected activity.

Particularly disturbing was the Review Board's conclusion to its analysis:

> That USEC's reason for terminating Jones might be unpersuasive or even "obviously contrived" does not mean that Jones succeeds here. "It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional

> discrimination." *St. Mary's Honor Center [v Hicks]*, 509 U.S. [502,] 519 [1993].

[R. 64, Review Board Final Decision, p. 17, Pet. App. at 46a.] As noted above, in *St. Mary's Honor Center*, this Court confirmed that, in the third and final stage of the *McDonnell Douglas* analysis, the burden is on the plaintiff to disprove the reasons proffered by the employer.

However, in a Section 211 action, once a petitioner has established that his protected activity constituted at least one contributing factor in the employer's adverse action against him, it is in fact enough to disbelieve the employer, because it is the employer that bears the burden of proving, by clear and convincing evidence, that it would have taken the same action even absent the employee's protected activity. The passage quoted above, more than any other, illustrates the flawed analysis of the Review Board and its flagrant disregard of the statutory framework established by Congress. When the Review Board states that Jones cannot prevail even if USEC's proffered reasons are "unpersuasive" or "obviously contrived," it raises doubts about whether the Review Board possessed any understanding whatsoever of Congress' intent.

D. The Circuit Court Erred When it Found, "At Most," Harmless Error in the Review Board's Adoption of the McDonnell Douglas Pretext Analysis and Failed to Reverse the Review Board's Final Decision

In this case, the Department of Labor's Administrative Review Board defied the will of Congress by imposing an onerous burden of proof on the Petitioner, borrowed from Title VII civil rights jurisprudence, in direct conflict with the 1992 amendments to the ERA. On review, the circuit court

gave only passing mention to the 1992 amendments and proceeded to uphold both the result and the reasoning of the Review Board, despite the latter's application of a clearly erroneous legal standard.

The circuit court acknowledged that ERA cases are governed by a different evidentiary standard than Title VII cases, and even cited the *Trimmer* decision, *supra*. [Circuit Court Decision, pg 8 of 16, Pet. App. at 7a.] However, the court then proceeded to state that "Jones has not shown that a 'pretext analysis' adversely affected his case or precisely how the use of pretext is incompatible with the burden-shifting standard for these types of claims." [Id.] The circuit court concluded that the Review Board's "alleged error" in applying the wrong legal standard "was at most a harmless one." [Id.] With due respect to the circuit court, this dismissal of Jones' claims was disingenuous.

The "pretext analysis" utilized by the Review Board was far more than harmless error. As noted above, instead of requiring Jones to prove only that his protected activity was "a contributing factor" in his termination, the Review Board rejected Jones' claims because he had not disproved each and every justification offered by USEC for its actions – a standard borrowed directly from the final (pretext) stage of the *McDonnell Douglas* framework.

Instead of reversing these clear errors on the part of the Review Board, the circuit court responded by superficially acknowledging the correct legal standards and then proceeding to uphold the Review Board's analysis, replicating the Review Board's five-part "pretext" analysis with its own five-part discussion. [Compare, R. 64, Review Board Final Decision, pgs 8-17 ("Pretext Analysis"), Apx 19-31 with Circuit Court Decision, pgs 8-16, Pet. App. at 10a-17a, 31a-

45a.] In so doing, the circuit court ignored Congress' mandate and contravened authoritative precedent from the Tenth and Eleventh Circuits.

E. The Circuit Court Erred When it Extended the Holding of the Sixth Circuit's Decision in Barnes v. Gencorp to a Section 211 Nuclear Whistleblower Action

In *Barnes v. GenCorp Inc.*,896 F.2d 1457, 1464-1466 (6th Cir. 1990), the Sixth Circuit held that, where a plaintiff in an ADEA (age discrimination) case has been discharged in a RIF, the plaintiff bears a heightened burden of proof in his *McDonnell Douglas prima facie* case. Despite the dissimilarities in the two statutory schemes, the circuit court in this case extended the holding in *Barnes* to whistleblower actions brought under Section 211 of the ERA. [Circuit Court Decision, pg. 15 of 16, Pet. App. at 17a.] In so doing, the circuit court once again undermined the clear congressional purpose behind the 1992 amendments to the ERA and once again brought itself into conflict with other circuit courts of appeals that have held that the amendments were an effort to ease, not increase, the burden on whistleblower plaintiffs.

The reasoning in *Barnes* has no application to a Section 211 whistleblower action and provides no justification for imposing a heightened burden on Section 211 petitioners. First, in a Section 211 action, there is nothing analogous to the *McDonnell Douglas prima facie* case, in which a party may create a presumption of discriminatory intent solely by virtue of being a qualified employee in a protected class. In a Section 211 action, the petitioner already meets the heavier burden envisioned in *Barnes* when he shows by a preponderance of the evidence – either direct or circumstantial

– that his protected activity was "a contributing factor" in his being singled out for discharge.

Second, the plaintiff in a *McDonnell Douglas* action always bears the burden of proving that discrimination was "a determining and motivating factor" in the termination. By contrast, in a Section 211 action, the burden shifts to the employer to prove by clear and convincing evidence that it would have discharged the employee even absent his protected activity. Where the burden is always on the employee to show discriminatory intent, there is a certain logic to increasing that burden in the context of a RIF. But where an employee is already required to establish that his protected activity was a contributing factor in his termination and where the final burden is on the employer to prove that it would have discharged the employee absent his protected activity, imposing a heightened burden on the employee serves no purpose other than to make it more difficult for the employee to prevail. In the case of Section 211, that is clearly contrary to Congress' intent, as found by other circuits. *Trimmer*, *Stone & Webster*, both *supra*.

CONCLUSION

Whistleblower protection in the nuclear industry is not only an issue of employee rights – it is also an issue of public safety and security. Section 211 of the Energy Reorganization Act not only protects the rights of employees in the nuclear industry – it also protects the public by ensuring that information about possible nuclear safety hazards is not suppressed by employees who fear retaliation at work.

In 1992, when Congress changed the burdens of proof in a Section 211 action, it did so for a purpose. Congress intentionally reduced the burden on the employee, who now

must prove only that his protected activity was "a contributing factor" in his employer's adverse action against him. Congress intentionally increased the burden on the employer, who must "demonstrate by clear and convincing evidence" that it would have taken the same action even absent the employee's protected activity. With these amendments, Congress changed the allocation of risk in a Section 211 proceeding and communicated that, in Congress' view, an erroneous decision in favor an employer in a nuclear whistleblower case represents a greater threat to public safety and security than an erroneous decision in favor of the whistleblower.

In this case, the Administrative Law Judge who heard the evidence and observed the witnesses as they testified found that Petitioner Douglas Jones had met his burden of proof and that Respondent USEC had not. In reversing that decision, both the Review Board and the circuit court effectively ignored the mandate of Congress and contradicted authoritative precedent from other circuit Courts of Appeals construing Section 211. Allowing the Review Board and circuit court decisions to stand undermines employee rights, public safety and the will of Congress.

The Petitioner, Douglas Jones, respectfully requests that the United States Supreme Court grant his petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-3729

[Filed January 10, 2006]

DOUGLAS JONES, Petitioner,	)
v.	)
U.S. DEPARTMENT OF LABOR, ET AL., Respondents.	)

ORDER

BEFORE: ROGERS and SUTTON, Circuit Judges; and ROSEN*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

* Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

original panel members but also to all other active** judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

** Chief Judge Boggs recused himself from participation in this ruling.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-3729

[Filed September 8, 2005]

DOUGLAS JONES, Petitioner,	)
v.	)
U.S. DEPARTMENT OF LABOR, ADMINISTRATIVE REVIEW BOARD; UNITED STATES ENRICHMENT CORPORATION, Respondents.	)

On Petition for Review from the United States Department of Labor

Before: ROGERS and SUTTON, Circuit Judges; ROSEN, District Judge.*

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

SUTTON, Circuit Judge. Douglas Jones seeks review of a decision by the United States Department of Labor's Administrative Review Board, holding that he failed to prove that his employer, the United States Enrichment Corporation ("the company"), retaliated against him in violation of the employee-protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851. As substantial evidence supports the Board's determination, we deny the petition.

I.

Jones worked at the company's gaseous diffusion plant in Paducah, Kentucky, from June of 1988 until his discharge as part of a reduction in force (RIF) on July 5, 2000. Jones first worked at the plant as an industrial hygiene technician and later moved into the environmental compliance department. In early 1995, he became the manager of the support services department, and in 1998 he transferred to the independent assessments department. In April 1999, he transferred again, this time to the training department. His subsequent discharge from this position as part of a RIF in 2000 lies at the heart of this dispute.

As a condition of his 1999 transfer into the training department, Jones agreed to accept responsibility for the Mobile Industrial Equipment (MIE) training program. He also agreed to an annual performance plan, which included the on-time completion of at least ninety percent of his "[t]raining enhancement" assignments and the assumption of responsibility for "[r]evis[ing] [t]raining modules, as needed, to comply with rules/regulations." JA 55. Jones' training program duties included developing training modules for heavy equipment used at the plant.

One of Jones' projects in the MIE training program involved a regulation promulgated by the Occupational Safety and Health Administration, set to take effect in December 1999, that threatened to render the training program for powered industrial trucks non-compliant. In the face of this development, Jones filed a problem report on May 13, 1998, "to ensure a tracking mechanism existed which would include evaluation of the newly promulgated training requirements and revision of the mobile industrial equipment training module(s) . . . prior to the [OSHA] compliance date of 12/01/99." JA 388. Problem reports are part of the company's plant-wide procedure for documenting issues--including non-compliance with safety regulations--and ensuring that they are resolved. From May 13, 1999, to March 23, 2000, Jones filed thirteen problem reports relating to deficiencies in training records, instructional materials and vehicle-operating licenses at the company.

Jones did not develop the powered-industrial-truck training module in time to meet the December 1999 OSHA compliance deadline. (He eventually completed the project on April 5, 2000.) On January 10, 2000, Jones submitted a written request to management seeking a transfer from the MIE training program to environmental training. In his request he acknowledged: "When I accepted [this] assignment, I did not foresee the various obstacles that" would arise and "[h]aving me as the [t]raining representative for mobile industrial equipment [] makes [the] [t]raining [department] appear weak because of my lack of experience in this area." JA 60. He also confessed that his lack of experience in the field had led to difficulty in "communicating the problems [he] perceive[d] in the program with management" and that there were "probably other personnel who would do a much better job . . . in this area." *Id.* The manager of the training department, Russ Starkey, denied

Jones' transfer request and instead moved Ed Craven, an experienced trainer and problem solver, into the MIE program. Starkey also replaced Ron Fowler as the supervisor of the training program, assigning Danny Bucy to supervise Jones and Craven.

In Jones' self-assessment, dated January 12, 2000, he admitted responsibility for the training areas assigned to him and acknowledged that "due to lack of training and expertise, [I] have not implemented all the changes needed, yet." JA 61. Shortly thereafter, on February 7, 2000, Jones received his mid-year evaluation from his former supervisor, Ron Fowler, in which Jones received a "meets expectation" rating in four categories and a "below goals/expectations" rating in the category relating to job knowledge, initiative and interpersonal skills. Jones protested the evaluation, after which the human resources department looked into the matter and concluded that the assessment was justified.

In February 2000, the company announced a RIF. Starkey and his four group managers agreed that it was necessary to reduce the employees in the production training division from two to one, meaning that either Craven or Jones would lose his job. Starkey, Bucy and Fowler independently rated Jones and Craven according to a list of job ratings. Jones scored considerably lower than Craven on the assessment, and the company discharged him on July 5, 2000.

On December 21, 2000, Jones filed a complaint with OSHA alleging retaliation in violation of § 211 of the Energy Reorganization Act. After an investigation, OSHA concluded that Jones' claim was without merit, noting that "the circumstances surrounding [Jones'] allegation of discrimination in violation of Section 211 of the ERA do not [compel an inference of] retaliation due to activity protected

by this Act." Letter from Karen L. Mann, Deputy Regional Administrator, Department of Labor, to Doug Jones of April 18, 2001. Jones then sought and received a formal hearing before an administrative law judge (ALJ), who concluded that the company discharged Jones at least in part in retaliation for reporting safety concerns. The company appealed this decision to the Board, which reversed the ALJ's decision after determining that Jones had not established by a preponderance of the evidence that retaliation was a contributing factor in his discharge. Board at 16.

II.

To prevail on his claim, Jones has the burden of proving by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an adverse employment action and (3) the protected activity was a contributing factor in the adverse employment action. 42 U.S.C. § 5851 (b)(3)(C); *Dysert v. United States Secy. of Labor,* 105 F.3d 607, 609-10 (11th Cir. 1997). If he meets this burden, the company may avoid liability by proving "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [the protected] behavior." *Trimmer v. United States DOL,* 174 F.3d 1098, 1101 (10th Cir. 1999); *see* 42 U.S.C. § 5851(b)(3)(D).

We review the Board's decision under the Administrative Procedure Act, 42 U.S.C. § 5851(c)(1) ("Review shall conform to chapter 7 of Title 5."), which means that we must uphold the Board's order and findings as long as they are not "arbitrary, capricious, an abuse of discretion, [] otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 706; *see Bartlik v. U.S. Dep't of Labor,* 73 F.3d 100, 102 (6th Cir. 1996).

Jones begins by arguing that the Board improperly failed to defer to the ALJ's witness credibility determinations and that this lack of deference by itself requires a reversal. We disagree.

Although a reviewing agency "is free to find facts and [] draw inferences different from those of the [ALJ]," *Litton Microwave Cooking Prods. Div. v. NLRB,* 868 F.2d 854, 857 (6th Cir. 1989), a reviewing court "must examine the evidence more carefully" when there is a conflict between the ALJ's and the agency's conclusions, *W.F. Bolin Co. v. NLRB,* 70 F.3d 863, 871 (6th Cir. 1995). "The significance, on review, of an [ALJ's] decision largely depends on the importance of witness credibility in the particular case," *Litton,* 868 F.2d at 857, and the issue for the court is "whether the [Review Board's] findings, and not those of the [ALJ], are supported by substantial evidence." *Mullen v. Bowen,* 800 F.2d 535, 546 (6th Cir. 1986).

In the present case, the ALJ's evaluation of Starkey and Jones, the only two witnesses to testify, does not mandate broad deference to all of the ALJ's findings. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496-97, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (noting that "the significance of [the ALJ's] report, of course, depends largely on the importance of credibility in the particular case" and recognizing that an ALJ's "findings [need not] be given more weight than in reason and in the light of judicial experience they deserve"); *Litton,* 868 F.2d at 857. And that is particularly so here because the case does not turn on witness credibility alone, *see Bolin,* 70 F.3d at 872-73, and because the ALJ's credibility rulings do not purport to address all of the witnesses' testimony or dispose of all of the issues in the case, *see, e.g.,* ALJ at 9-11, 13-14, 24.

The present case concerns allegations of retaliation arising from inferences drawn from the timing and context of a series of events: Craven's transfer into the MIE program, Jones' negative evaluations, management's alleged shunning of Jones and failure to assist him in completing the training modules, and Jones' discharge. The resolution of the claim, as a result, involves more than crediting one witness over another. It also requires the evaluation of deposition testimony and a substantial record of documentary evidence, both of which the ALJ considered in reaching a decision in this case and both of which the Board could second guess without credibility-based constraints.

Nor does our decision in *Litton* alter this conclusion. There, the agency's decision contradicted the express terms of a management-rights clause in a collective bargaining agreement and rested, at least in part, on testimony by a witness *expressly discredited* the ALJ. *Litton,* 868 F.2d at 857-58. The ALJ in *Litton* made general conclusions that one witness was "precise, unequivocal and unambiguous" while the other was "evasive and clearly bent on making his case." *Id.* Jones claims that the same is true here, Jones Reply Br. at 12, but the cited portion of the ALJ's decision does not make such a sweeping assessment, *see* ALJ at 47 ("[It] is my opinion that . . . [Jones] was [] hurt, disappointed, [and] devastated. . . . I have observed his forthrightness, his consistency, and demeanor throughout the trial, and I credit his testimony *on these points.*") (emphasis added) (quotation omitted). Because witness credibility did not play a decisive role in this case, the Board acted well within its authority in drawing its own conclusions based on its independent review of the evidence.

Jones next argues that the Board erred by applying the *McDonnell Douglas* burden-shifting framework to his claim.

Compare 42 U.S.C. § 5851 *with McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668(1973). In one sense, Jones is correct: The Energy Reorganization Act has its own burden-shifting standard for claims of this sort. *See* 42 U.S.C. § 5851; *Trimmer,* 174 F.3d at 1101 ("In 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green.*"). But the Board's mere reference to a "pretext analysis" in discussing Jones' claim does not make the decision arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Jones has not shown that a "pretext analysis" adversely affected his case or precisely how the use of pretext is incompatible with the burden-shifting standard for these types of claims. Substantial evidence, at any rate, supports the Board's ultimate conclusion that Jones failed to establish by a preponderance of the evidence that retaliation contributed to his discharge, making this alleged error at most a harmless one.

Jones next attempts to forestall this conclusion by pointing to five episodes that, in his view, demonstrate that retaliation was behind the discharge. *First,* Jones points to management's failure to assist him in developing a training module, which allegedly caused him to fail to meet a deadline for developing the module. The Board concluded that management did not "ignore [Jones'] requests for help" but assisted him and "wanted him to demonstrate initiative . . . , develop action plans and propose solutions, not make excuses for his inaction." Board at 9.

Substantial evidence supports this conclusion. Jones entered the training department at his own request and with the understanding that he would acquire on-the-job training.

As Jones acknowledged in his testimony before the ALJ, moreover, when he eventually took the 'training the trainer' course he complained about not receiving, it involved information that had been 'readily available' to him all along. JA 598-99. He also admitted that he never requested special training in how to develop certain training modules and that at any time he could have interviewed the 'people who actually operate the equipment [used at the company] for input and guidance' in developing these training modules. JA 600. Finally, he admitted that other employees, *e.g.*, JA 601-03 (Diane Snow), including members of the training department, *e.g.*, JA 519-20 (Donnie Gregory), were willing to assist him in performing his job.

The positive feedback that Jones received also demonstrates that management sought to assist rather than stymie his efforts to finish his assignments. Jones admitted in his testimony that he was 'encouraged' to submit problem reports and that he was never criticized for filing a problem report. JA 588. Fowler told him: "I appreciate the aggressive nature [you're] demonstrating [in] finding and identifying these [safety] issues ... Good work." JA 607. And following Jones' discovery of another safety issue, Fowler told him to "keep on looking." JA 531. Starkey directed Jones to fill out a problem report regarding the training compliance of powered industrial trucks with the new OSHA guideline, so as to "get it on a schedule and get it resolved, corrected." JA 615. Starkey also offered encouragement at various times, noting: "you're doing a good job discovering these problems," JA 527, "your reasoning appears sound to me ... Go for it," JA 58, and "this all seems to make sense to me . . . . Good job." JA 529.

Jones responds by pointing to the ALJ's finding that the readily available training materials did not provide "timely or

meaningful assistance to Jones." ALJ at 8. This response, however, does not account for the other evidence supporting the Board's conclusion: Nor does it account for the equally realistic possibility that the Board simply disagreed with the ALJ on this point. *See Litton,* 868 F.2d at 857; *Mullen,* 800 F.2d at 546.

Jones also points to the ALJ's conclusion that some of Starkey's encouragement was "inane" and that one of his "encouraging" e-mails was "a somewhat sarcastic, and less than serious, reply" to Jones' request for help. ALJ at 10. But Starkey offered encouragement on other occasions, as did Fowler, and the ALJ's conclusion with respect to two instances involving Starkey, based only on testimony from Starkey and Jones, does not support the sweeping conclusion that management's encouragement invariably was sarcastic or unhelpful.

Second, Jones points to the timing of Craven's assignment to the MIE program as evidence that the company was preparing to discharge Jones in retaliation for reporting safety concerns. The Board concluded that the timing of the transfer was "merely coincidental," Board at 10, and was a "legitimate business response to Jones' failure to develop... the necessary training modules." *Id.* at 9-10.

Substantial evidence also supports this conclusion. Starkey testified that between April 1999 and January 2000 Jones' progress in developing training modules "was very slow. Very, very slow." JA 613. In his January 2000 self-assessment, Jones admitted that he had failed to address problems with the MIE training module in a timely manner. And at roughly the same time, he requested re-assignment and admitted that "other personnel . . . would do a much better job" with the training program. JA 60. Against this backdrop,

it is difficult to second guess Starkey's decision to move Craven, an "experienced . . ., creative and innovative" trainer and problem-solver, JA 621, into MIE training, and equally difficult to second guess the Board's conclusion that the "relatively close proximity of Craven's transfer in February 2000 . . . does not support an inference that [the company] plotted to oust Jones," Board at 10.

Jones persists that this conclusion overlooks two pieces of evidence – that Craven had no prior experience in MIE and that there is no proof that Craven participated in the MIE program before implementation of the RIF on July 5, 2000. That Craven had no specific experience in MIE, which was also true of Jones when he took the job, does not rebut Craven's other proven qualifications, all of which support the transfer decision. Confirming the point, Starkey testified that after Craven was assigned to MIE he was "off and running" on the training program, a conclusion Starkey reached after "checking on at least a weekly, if not daily[,] basis to see where the program was going." JA 639-40.

Third, Jones contests his mid-year performance evaluation and claims that it was designed to set him up for the RIF. The Board concluded that the "below goals/expectations" rating for job knowledge, initiative and interpersonal skills "was a warning that management thought he lacked initiative in solving the problems related to the MIE program," Board at 11, and "was not part of a plan to 'set up' Jones for the upcoming RIP." *Id.*

Several pieces of evidence support this conclusion: Jones agreed to be subject to evaluation when he transferred into the training position and he understood that completion of ninety percent of his assignments on time would be an evaluation criterion; Jones admitted in his self-evaluation to failing to

correct problems in the MIE training program in a timely manner; and Jones later requested a transfer due in part to his inability to perform his duties.

Jones counters that this conclusion ignores an entry on his mid-year evaluation sheet admitting that "[Jones] is working towards the correction of a problem he 'INHERITED' that nobody knew had so many problems. He is working to correct these problems but is needing help." JA 62. This entry, however, acknowledges only that Jones inherited a difficult problem; it does not excuse his inability to solve the problem or say that he made adequate attempts to address the problem. Nor does the entry explain how Jones' low ratings score stemmed from his participation in protected activity.

Jones also claims that the Board ignored Danny Bucy's statement that "[t]hey're trying to do to [Jones] what they did to Howie Morehead." JA 543. According to Jones, "Morehead was a former training department employee who was given a bad evaluation and then forced to resign." Jones Br. at 44. But since Jones offers no evidence that Morehead was forced to resign due to engaging in protected activity, the comparison offers little, if any, insight into the cause of Jones' discharge.

Jones also asserts that because he had never received a less than satisfactory rating on an evaluation before, his "below expectations" rating establishes an intent to retaliate. Again, however, the evidence indicates that he deserved the low rating, even if it was his first one. In addition to the above evidence, Starkey testified that although he expected and wanted Jones to raise safety concerns, Starkey's "chagrin came from the fact [that once] we knew . . . we had a problem - - . . . . [w]e weren't moving aggressively or fast enough to get [it] resolved." JA 636-37. Instead, he testified,

Jones supplied "excuse after excuse after excuse after excuse." JA 633. When Jones protested the "below expectations" rating, the human resources department conducted a review and concluded that Jones was "well-qualified [] to write modules" but that "his efforts to take advantage of [available] assets were minimal at best." JA 378.

Fourth, Jones claims that Bucy shunned him after he engaged in protected activity. According to Jones, Bucy "became very angry" with him for refusing to use the text of an OSHA guideline as a substitute for a training module and thereafter was "cool" toward him. The "timing and context of this change in attitude," Jones complains, were overlooked by the Board when it concluded:

> [T]hough Bucy may have been unhappy about the added responsibility of supervising Jones and Craven, and argued with Jones about the OSHA guideline, his interactions with Jones do not convince us that Bucy had a negative attitude toward Jones or that he shunned him. More significantly, even if Bucy's attitude could be deemed antagonistic, Jones has not adduced sufficient facts for us to infer that this enmity existed because of his protected activity.

Board at 13.

This conclusion, too, is amply supported. In his deposition, Bucy denied any change in attitude towards Jones as a result of being placed in charge of him. He also stated that because he and Jones "were in the same office area," they regularly "discuss[ed] problems," JA 667-68, and that he answered Jones' questions on a daily basis. Jones, moreover, admits that he was not disciplined or hindered in his attempts to perform his job as a result of the alleged argument, and

Bucy admitted that Jones was correct to insist on designing a specific module for use in one of the training programs.

Fifth, Jones claims that the "arbitrary and subjective nature of the judgments coming from Starkey, Bucy and Fowler" in the May 2000 RIF evaluations as well as the "context in which the competency evaluations took place" demonstrate that the discharge stemmed from his protected activity. Jones Br. at 47. Although the Board conceded that Jones received undeservedly low scores in two of the fifteen job ratings used to evaluate employees before the RIF, it found that management "employed a legitimate method" as well as a "reasonable and fair process to evaluate" the two employees. Board at 14. It also concluded that "Jones ha[d] not established that the [company] managers rated him below Craven because of his protected activity." Board at 13.

Substantial evidence supports these findings. Although he disputes the legitimacy of the RIF evaluation method – calling it subjective and arbitrary as well as claiming that the ratings were never intended for use in a RIF – Jones does not dispute the legitimacy of management's decision to discharge one of the two employees in the production training division in the RIF, meaning that he or Craven would lose his job. He also concedes that the "competency criteria for the [RIF] evaluation . . . [were established] by upper management," Jones Br. at 48--by people, in other words, that he does not claim wished to retaliate against him. Starkey also testified that a "senior management team allocated the [ratings] to particular jobs such as trainer" and that this list of ratings was used to evaluate all employees with that job description, even those at another plant. JA 629. Despite Jones' claim that the ratings were never intended for use in a RIF, Jones Br. at 46-47, Starkey also testified that one of the reasons the company obtained the list of ratings from an outside consultant was in

case it "found [itself] in a situation where [it] had to have an involuntary RIF, [then it] would have a matrix of these competencies, against which to evaluate those being considered for RIF." JA 628-29. Based on this testimony and Jones' concessions, substantial evidence supports the Board's finding that the company employed a legitimate method to evaluate Craven and Jones. And that is all the more true given the setting in which these evaluations took place. In *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir. 1990), the court recognized that a Title VII plaintiff alleging an improper discharge in the context of a RIF faces a heightened burden of proof because the RIF itself is evidence of a legitimate reason for the discharge. *Id.* at 1464-65.

Jones next contends that because neither Fowler nor Bucy could "explain the meaning of the [ratings] or how employees were rated in them," Jones' evaluation was "far from objective." Jones Br. at 48. He also points out that when the ALJ questioned Starkey, Starkey explained Craven's higher rating by referring to anecdotal evidence of Craven's superiority and inadvertently credited Craven for work performed by Jones. That Fowler and Bucy had trouble remembering these details a year after the RIF took place, however, is not unusual and hardly compels the inference that retaliatory animus motivated their evaluations. And that Starkey inadvertently credited Craven for some work performed by Jones (when questioned long after the ratings were given) does not rebut the evidence supporting the Board's conclusion that the ratings were the result of a legitimate method and a fair and reasonable process.

III.

For these reasons, we deny the petition.

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

ARB CASE NOS. 02-093, 03-010;
ALJ CASE NO. 01-ERA-21

[Filed April 30, 2004]

In the Matter of: DOUGLAS JONES,	)
COMPLAINANT,	)
	)
v.	)
	)
UNITED STATES ENRICHMENT	)
CORPORATION,	)
RESPONDENT.	)
	)

OPINION BY: THE ADMINISTRATIVE REVIEW BOARD: OLIVER M. TRANSUE, Administrative Appeals Judge; JUDITH S. BOGGS, Administrative Appeals Judge

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Douglas W. Jones filed a complaint against the United States Enrichment Corporation (USEC) under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995),[1] and its implementing regulations at 29 C.F.R. Part 24 (2003). He alleged that USEC terminated his employment due to his protected activity while developing equipment training programs at USEC's Paducah, Kentucky gaseous diffusion plant.

In his Recommended Decision and Order, the Administrative Law Judge (ALJ) concluded that USEC discharged Jones in retaliation for his protected activity.[2] Therefore, the ALJ ordered USEC to reinstate Jones. He awarded Jones back pay, compensatory damages, other job-related benefits, and attorney's fees. USEC asks us to review

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[1] The statute provides, in pertinent part, that "no employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or AEA, testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or cause, or testified, assisted or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

[2] The following abbreviations shall be used: Claimant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR; Joint Exhibit, JX; and Recommended Decision and Order, R. D. & O.

the ALJ's recommended decision. Jones asks that we review the ALJ's attorney's fees award. We reverse the ALJ and deny Jones's complaint.

BACKGROUND

In 1998 USEC, a private company, took over the Paducah gaseous diffusion plant from Lockheed Martin Utility Services, which had operated it under contract with the federal government. The Paducah plant is "the middle step" in the overall process of making uranium ore into fuel for commercial nuclear reactors. The plant enriches uranium hexafluoride gas in the U235 isotope and then ships the enriched uranium hexaflouride to a fuel pellet fabricator for use in commercial reactors. JX 3 at 13.

The takeover and privatization led to a reduction-in-force (RIF) in 1999, and several employees in USEC's training department volunteered for the RIF. JX 3 at 14, 16. Jones, who began work for USEC in 1988 as an industrial hygiene technician, was working in Paducah's independent assessments department in 1999 and was subject to the RIF. TR at 46, 265-66. To avoid the RIF, Jones transferred to the training department in April 1999 and replaced two riffed employees.[3] TR at 47-54, 61-63. At the time that he joined the training department, Jones was not an experienced trainer. However, Jones had a bachelor's degree, a college teaching

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[3] Russell Starkey, head of the training department, testified that he knew Jones was in the pool of potential RIF candidates before he came to the training department in April 1999. TR at 265-66. Jones had avoided an earlier reduction in force by transferring to another department and had actively sought the transfer to Starkey's department. JX 3 at 15, 19-21; TR at 61-63.

certificate, and was a scuba diving instructor, trained to teach students how to use scuba equipment safely. TR at 46, 52-53.

As part of his new duties, Jones was responsible for the mobile industrial equipment (MIE) program. TR at 62; JX 3 at 23-24. His supervisor, Ron Fowler, told him to learn how to operate various pieces of MIE and to develop training modules.[4] TR at 63. Jones was not impressed with the quality of the training his predecessors had done and resolved to do better. TR at 64-66.

His first project involved a new Occupational Safety and Health Administration (OSHA) regulation that was to become effective in December 1999. TR at 70-78. The regulation required Jones to develop a training module for powered industrial trucks (PITs), a segment of the MIE program.[5] But Jones began to experience what he called "frustrations and roadblocks" as he tried to obtain information and materials to produce this module. TR at 84. He stated that he got "zero specific guidance" from Fowler, and that Russell Starkey, manager of the training department, listened to him describe the problems he was having, but simply directed him to "fix them." TR at 79-85.

Jones did not complete the PIT project in time to meet the December 1999 deadline. CX 16B; TR at 109-12. Therefore,

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[4] A module consists of written and visual instruction that a trainer presents to employees to ensure that they operate equipment safely. JX 1 at 8-9, 16.

[5] The PITs at Paducah consisted of forklifts, fork trucks, tow motors and tractors, flat form lift trucks, hand trucks, cylinder haulers, handlers, industrial crane trucks, carry deck cranes, and yard tractors. JX 1 at 34.

upper management directed him to file an assessment tracking report (ATR). These reports are part of USEC's Business Prioritization System, "a plant-wide tickler system" to ensure that problems and issues, such as non-compliance with OSHA rules, are formally noted, followed up, and corrected. JX 3 at 26; TR at 268-69. Between May 13, 1999, and March 23, 2000, Jones filed 13 ATRs concerning deficiencies he found in training records, instructional materials, and operating licenses. *Id.* Jones filed the ATR concerning the PIT project on December 9, 1999. CX 26.

Jones continued to experience problems carrying out his duties, and on January 10, 2000, he requested that he be assigned to a different job. CX 8. He made this request because he felt that his "lack of progress is making the Training Organization appear ineffective and disorganized," because he was "having a difficult time communicating the problems" he perceived, because "[m]obile industrial equipment is not my area of expertise," because there "are probably other personnel who would do a much better job than me in this area due to experience and expertise," because the "plant needs an expert in this area," and, finally, because of "my peace of mind." *Id.* Starkey denied his request but assigned Ed Craven, a more experienced employee, to work on the MIE program with Jones. Danny Bucy, a group manager, was assigned to supervise Jones and Craven. TR at 270-72.

Shortly thereafter, though no longer his immediate supervisor, Fowler evaluated Jones on his mid-year progress. Fowler gave him a "meets expectations" rating on four performance factors but a "below expectations" in the performance factor relating to job knowledge, initiative, and interpersonal skills. CX 10. Jones protested the evaluation. He stated that when he had taken over the MIE program, he

had no experience or training in mobile industrial equipment, and that Fowler had offered insufficient guidance. Jones added that he had not received training to be a classroom instructor or a training materials developer. In this same employee concerns report, he warned that an inadequate MIE training program would put employee safety at risk. CX 11.

In response to Jones's protest, investigators in USEC's human resources department interviewed Jones's managers, Fowler, Bucy, and Starkey. The investigators recommended no change in Jones's mid-year rating. CX 25. They found that Jones "did not demonstrate the initiative expected from an employee" at his grade level even though Jones had been referred repeatedly to procedures on how to write and develop training modules and to hundreds of training modules that could have been used as examples. *Id.*

Earlier in 2000, USEC announced another RIF because of changing business conditions. Uranium enrichment prices were down, and the market forecasts indicated a flat demand. TR at 276-78. Upper management instructed Starkey to reduce his training department force by two. Starkey consulted with his four group managers. They determined that three of the four divisions of the training department could not afford a reduction in personnel. But since the MIE program, which was part of the production support training division, would only "require about a half FTE worth of work" within the next year, Starkey and his managers decided that one of the two personnel reductions had to be made from the production training division. Jones and Craven were the only two employees in that division. TR at 279-81.

To determine who would be terminated, Starkey, Bucy, and Fowler independently rated Craven and Jones according to a list of job profile and functional "competencies" that a

consulting company had developed for USEC management to use in RIF situations. TR at 281-83; CX 21(b). A group of USEC senior managers had previously determined which of the "competencies" applied to trainers like Jones and Craven. CX 18; TR at 281-283. A day or two later, Bucy, Fowler, and Starkey met and decided on a consensus rating for Jones and Craven. TR at 284-291. Jones's overall score was considerably lower than Craven's. CX 18. Therefore, USEC discharged Jones on July 5, 2000.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended]

decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself").

In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins v. United States Envtl. Pro. Agency,* ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 10 (ARB Feb. 28, 2003) (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB will defer to an ALJ's credibility determinations that are based on such observation. *Melendez v. Exxon Chemicals Americas,* ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 6 (ARB July 14, 2000).

Only Jones and Starkey testified before the ALJ The ALJ credited Jones's testimony over Starkey's. He found Starkey's explanation of Craven's superior performance not credible because, in the ALJ's opinion, Starkey was wrongly blaming Jones for his own managerial deficiencies. For the ALJ, management, not Jones was responsible for the difficulties on the MIE project. *See* R. D. & O. at 10-11, 22-24, 36-37, 40. But since the ALJ did not base this credibility determination on demeanor, we are not bound, as Jones contends, to give substantial weight to Jones's testimony. Complainant's Response Brief at 12-15. *See Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) ("The Board gives great deference to an ALJ's credibility findings that 'rest explicitly on the evaluation of the demeanor of witnesses.'"), *citing NLRB v. Cutting,* 701 F.2d 659, 663 (7th Cir. 1983)).

ISSUE

Did Jones prove by a preponderance of the evidence that his protected activities were a contributing factor in USEC's decision to select him for the involuntary RIF?

DISCUSSION

The Legal Standard

Since this case has been tried on the merits, the relevant inquiry is whether Jones has successfully met his burden of proof that USEC retaliated against him due to his protected activities. That burden is to prove by a preponderance of evidence that he engaged in activity that is protected under the ERA, that USEC knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action USEC took. If Jones carries this burden, we proceed to determine whether USEC has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. *See* 42 U.S.C.A. § 5851(b)(3)(C), (D); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 7-8 (Sept. 30, 2003).

We note that the ALJ misstates the legal standard when he writes that an ERA employer must establish by clear and convincing evidence that it would have taken the same adverse action "once the complainant establishes a prima facie case." *See* R. D. & O. at 26, 27, 29, 35, 43. USEC's clear and convincing burden of proof is in the nature of an affirmative defense and arises only if Jones has proven by a preponderance of evidence that USEC terminated his employment in part because of his protected activity. *See*

Kester, slip op. at 8. USEC's only burden after Jones makes a prima facie case of discrimination is one of production; that is, it must merely articulate a legitimate reason for terminating Jones. *See Dartey v. Zack Co. of Chicago,* 82-ERA-2, slip op. at 5 (Sec'y April 25, 1983). Thereafter, the question is discrimination vel non. *See United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714 (1983).

Protected Activities and Adverse Action

Jones argues that he engaged in protected activity when he filed ATRs concerning violations of governmental regulations pertaining to the MIE/PIT program. He asserts that filing the ATR's notified USEC of violations involving nuclear safety and thus advanced the ERA's purpose of assuring public health and safety. *See* 42 U.S.C.A. § 5801(a). Furthermore, since his duties related particularly to the powered industrial trucks, some of which haul radioactive material, Jones contends that when he reported to his supervisors that he was not trained or adequately supervised to carry out these duties, he also engaged in protected activity. Complainant's Response Brief at 15-18.

USEC counters these arguments by contending that Jones did not engage in protected activity under the ERA because he did not raise definitive and specific concerns regarding nuclear safety. Rather, USEC argues that Jones's activities pertained only to occupational safety and health issues, not nuclear safety. USEC further contends that the training courses Jones was assigned to develop, which are the basis of

his concerns, are not related to nuclear safety.[6] Respondent's Initial Brief at 6-12.

The ALJ found that filing the ATRs and complaining to the supervisors about being inadequately trained to develop the MIE/PIT training module constituted protected activity. R. D. & O. at 32. We will assume, without finding, that Jones engaged in protected activities when he filed the ATRs and complained about the training and supervision because we decide this case on other grounds – namely, that Jones failed to meet his burden of proof to show that his protected activities were a contributing factor in USEC's decision to terminate his employment. *See Smalls v. South Carolina Elec. & Gas,* ALJ No. 00-ERA-027, ARB No. 01-078, slip op. at 6 (ARB Feb. 27, 2004).

The ALJ also found that USEC knew about Jones's protected acts. R. D. & O. at 33. We agree because the record clearly demonstrates that fact.

Furthermore, the parties stipulated, and we find, that the July 5, 2000 RIF termination constitutes adverse action. But the ALJ made additional findings concerning the adverse action that USEC took against Jones. He found that the ratings that the USEC managers gave Jones in his May 23, 2000 IRIF Candidate Selection Summary, which formed the basis for the July termination, were unjustified and therefore

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[6] Two kinds of training occur at Paducah -- SAT (systemic approach to training) and non-SAT. SAT training methods are developed to meet specific regulatory requirements under the licensee certificate that the Nuclear Regulatory Commission (NRC) issued to USEC. The non-SAT based training that Jones was involved with did not require the same degree of developmental rigor. JX 3 at 97-98; JX 4 at 46-47. *See* R. D. & O. at 7.

constituted an adverse action. He also determined that Bucy's active "shunning" of Jones and USEC's transferring Craven to the MIE program in February 2000 were adverse actions. R. D. & O. at 33. Thus, the ALJ concluded that USEC violated the Act not only when it terminated Jones because of his protected activity, but also when it took these additional adverse actions because of protected activity. *Id.* at 43.

We make no findings as to whether these three additional events constitute adverse action because each occurred more than 180 days before Jones filed his December 21, 2000 complaint. Therefore, even if they were adverse to Jones, they are not actionable. *See* 42 U.S.C.A. § 5851 (b)(1); 29 C.F.R. § 24.3 (b) (2); *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002) ("Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."). Thus, the ALJ erred in concluding that USEC violated the ERA when its managers rated Jones lower than Craven, when Bucy allegedly shunned Jones, and when Craven was assigned to the MIE program.

Causation

Jones has not produced "direct" evidence that USEC terminated his employment because of his protected activity. *See Aikens,* 460 U.S. at 716 ("The question facing triers of fact in discrimination cases is both sensitive and difficult .... There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

Therefore, in determining whether Jones demonstrated that his protected activity was a contributing factor in USEC's decision to terminate his employment, we apply the established and familiar Title VII methodology wherein after

the complainant has established a prima facie case and the employer has rebutted it, the complainant attempts to prove that the employer's reason for the adverse action is a pretext. *See Kester,* slip op. at 5 at n12. And though we may infer that USEC discriminated if Jones convinces us that USEC's reason for terminating him is a pretext, Jones still must demonstrate by a preponderance of the evidence that USEC terminated his employment, at least in part, because of protected activity. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511, 519, 524 (1993).

USEC asserts that it terminated Jones's employment because Craven had objectively better qualifications, training, and performance. Respondent's Initial Brief at 3. Jones argues that the reason USEC gives for terminating him, not Craven, is false. What actually happened, Jones contends, is that because of his protected activity, USEC managers stymied his efforts to perform his duties, unnecessarily assigned Craven to the MIE program, gave him an unwarranted rating on his mid-year evaluation, shunned him, and employed an unfair method and highly subjective, "hidden" criteria in the test it used to choose him for termination. Complainant's Response Brief at 23-28. In short, Jones claims that USEC did not terminate his employment for legitimate reasons, but that he was "set up" because of his protected activities. *Id.* at 6. We conclude, however, that Jones has not shown that USEC's proffered reason was a pretext for discrimination.

Pretext Analysis

1. USEC did not prevent Jones from using available training procedures and human resources to complete his assignments.

Jones contends that his managers set him up to perform poorly when they failed to provide him with sufficient guidance and training. This thwarted his efforts to develop proper training modules for the MIE program. Complainant's Response Brief at 3-7. USEC answers that even if Jones's managers should have done a better job of guiding and supervising Jones, they nevertheless encouraged Jones to take the initiative and correct the training problems he raised. Respondent's Initial Brief at 17-19. The ALJ found that Jones's managers abrogated their responsibilities in training Jones because of his protected activities, thereby setting Jones up for the RIF termination. R. D. & O. at 35-37, 41-42

When Jones first came to the MIE program, Starkey waived certain training requirements because of Jones's background and teaching experience. The understanding was that Jones would acquire on-the-job training and assume responsibility. CX 2, TR at 182-83, 209, 265-68. Initially, Jones responded. He learned how to operate a forklift, overhead crane, and self-propelled work platform, and sought the advice of other employees on developing training modules. TR at 66-67, 210-14.

But problems set in as Jones tried to develop the PIT module. He complained that he could not get the information and materials to produce the module. TR 84-85. Then he took a "training the trainer" course in March 2000. He testified that this course, which was SAT-based, consisted of training procedures that had been "readily available" for his review all

along. TR at 212. He also admitted that he never asked for any special training on how to prepare MIE modules. TR at 211. He stated that he could have interviewed the employees who operated the equipment to obtain input and guidance in developing a training module. TR at 213. He added that others in the training department were willing to help him. TR at 75. Jones further admitted that one manager, who was not even in the training department, did "the majority" of the work for an action plan that Fowler had requested him to develop. TR at 215-16; RX 2.

Furthermore, Jones's managers enthusiastically supported his efforts to develop training modules. JX 3 at 25-27, CX 3-4; TR at 80-90, 187-89. Responding to a November 1, 1999 memorandum from Jones about a plan for addressing the MIE program, Starkey commented: "This all seems to make good sense to me. Good job." CX 3. Similarly, when Jones asked about extending an OSHA interpretation concerning end-loaders to equipment like golf carts, Starkey responded: "Your reasoning appears sound to me. Go for it." CX 4, TR at 87. Based on information Jones provided, Starkey instructed two managers to file an ATR to address the issue. CX 5, 26.

Moreover, Fowler responded to Jones's memorandum concerning a technical review of training modules: "Keep on looking. It appears you have a marvelous opportunity to excel!!!!!" CX 6. Fowler also told Jones: "I appreciate the aggressive nature you're demonstrating in finding and identifying these issues. It appears guidance toward a cure is what you need now. Good work!" Finally, Starkey and Fowler both approved Jones's request to order a $ 395.00 video package on OSHA training for forklift operators. Fowler stated that he completely agreed that the purchase of

the package was "the way to go!" Starkey ordered Jones to "get the whole package." CX 7.

Thus, the record does not support Jones's argument, and the ALJ's finding, that USEC managers were to blame for Jones's poor performance. USEC managers did not ignore his requests for help. They wanted him to demonstrate initiative and advised him to develop action plans and propose solutions, not make excuses for his inaction. By his own admissions, Jones failed to help himself enough to meet the expectations of his managers. More importantly, even if USEC's training managers could have done a better job of supervising and training Jones, Jones has not shown that any such lack of supervision and training was motivated by his protected activity.

2. The assignment of Craven to the MIE program was a legitimate business response to Jones's failure to develop the necessary training modules.

Jones argues that USEC was predisposed to discharge him because he had raised so many safety concerns about the training modules. Jones claims that Starkey's assignment of Craven to work with him on the MIE program at the same time that RIF layoffs were announced at the Paducah plant evidences this predisposition. According to Jones, by assigning Craven to the MIE program, USEC set the stage for eventually selecting Craven when the time came to decide which of the two to terminate. Complainant's Response Brief at 27. USEC counters that Starkey assigned Craven because Jones had admitted that he could not handle the MIE program. Respondent's Initial Brief at 24. The ALJ found that USEC's motivation in assigning. Craven to Jones's training group was "so there could be a comparative analysis" to eventually lay off Jones. R. D. & O. at 34.

When he joined Fowler's training group, Jones assumed responsibility for the MIE program and was told to learn how to operate various pieces of equipment and develop training modules for powered industrial trucks (PITs). TR at 52, 62-63; JX 3 at 20, 23-24. Despite his work background and teaching experience, Jones's progress from April 1999 to January 2000 "was very slow. Very, very slow." TR at 267. In fact, Jones admitted in a January 12, 2000 self-assessment that, although he had identified problems with the MIE program, he had not "implemented effective corrective actions yet." CX 9.

An example of Jones's slow progress is the fact that he missed the December 1999 deadline to revise the forklift training program. CX 16; TR at 109-12, 216, 243. In February 2000, Jones blamed this failure and other problems on management, which he stated had not given him sufficient training and guidance. CX 23. But Jones's managers blamed him. As already noted, they reported that Jones lacked initiative in fixing the problems he encountered despite the available "how-to" procedures and "numerous training modules that could have been used as examples" for developing the training programs. CX 25.

And even though he blamed management for his failures, Jones himself requested a "job assignment change" in January 2000 because he could not handle the MIE program duties. CX 8. As a result, Starkey transferred the MIE program from Fowler to Bucy, and brought in Craven, who had taken on other problem programs and done "some very creative and innovative things with them." CX 27, RX 3; TR at 275-76. In fact, by August 2000 Craven had produced all the required training modules for the MIE program. TR at 291-92.

Given these facts, we find that Starkey assigned Craven to work with Jones and Bucy to rescue a failing program that Jones acknowledged he had not been able to manage. Starkey was responsible for overall training and fixed the MIE situation when he assigned a known trouble-shooter, Craven, to the program. The fact that USEC announced a RIF at approximately the same time that Craven was transferred to the MIE program in February 2000 is merely coincidental, not conspiratorial. And the relatively close proximity of Craven's transfer in February 2000 to "fix"the MIE program and Jones's RIF rating in May 2000 does not support an inference that USEC plotted to oust Jones. Therefore, we conclude that transferring Craven to the MIE program was a legitimate business response to Jones's failure to develop and implement necessary training modules.

3. Jones has not shown that his mid-year evaluation was not a legitimate performance rating.

Jones contends that his mid-year performance evaluation on February 8, 2000, is additional evidence that USEC was setting him up for the RIF discharge. Complainant's Response Brief at 6-7. Jones asserts that he did not deserve a "below goals/expectations" rating for his "job knowledge, initiative, interpersonal skills." CX 10. USEC argues that Jones deserved the rating, based on his performance from July through January 2000. Respondent's Initial Brief at 18-25. The ALJ found that the performance rating and management's response to Jones's protest about the rating "set up the scenario" for Jones's managers to select him for the RIF. R. D. & O. at 41.

When Jones started work in the training department, he agreed to an annual performance plan under which he would be rated for achieving certain goals. These goals included

completing 90 percent or more of his assignments on schedule, assuming responsibility for the MIE program, and revising training modules to comply with safety rules and regulations. CX 2. Six months later, Jones assessed his own performance and admitted that while he had "documented various problems" with the MIE program, he had not "implemented effective corrective actions yet" and needed training as an instructor/developer to correct the problems effectively. CX 9.

On February 7, 2000, Fowler evaluated Jones's work in a mid-year appraisal report. Fowler gave Jones a "meets expectations" rating in four of the five performance factor areas, but a "below expectations" in the performance factor involving job knowledge, initiative, and interpersonal skills. Fowler stated that Jones was working on a project he had inherited, one "that nobody knew had so many problems," and which Jones was trying to correct "but is needing help." CX 9, 10. Jones protested the "below expectations" rating and filed an "employee concerns" report, stating that he was tasked with fixing the MIE program, but was not supplied with the guidance, support, or tools to do so. CX 23.

USEC's human resources department investigated Jones's protest. It found that Jones's managers, Starkey, Bucy, and Fowler, had all agreed that, with his background, Jones was "well qualified to write training modules, given the available how-to procedures and the numerous training modules that could have been used as examples." But it also found that Jones had not shown sufficient initiative in developing the necessary training programs or in seeking the procedures and examples of training modules that were available. CX 25. Starkey testified that Jones raised safety issues about the MIE program, which he was expected to do, but "my chagrin came from the fact" that "we weren't moving aggressively enough

or fast enough to get them resolved." TR at 290-91. He added that there was "just excuse after excuse after excuse after excuse." TR at 287.

The record demonstrates that Jones was not meeting management's expectations in taking the steps required to produce the training modules. While Jones might have benefited from additional training or assistance, he has not shown that either the failure to provide additional training or assistance or the expectations themselves were a subterfuge for discrimination. Jones's mid-year evaluation was a warning that management thought he lacked initiative in solving the problems related to the MIE program. Thus, the evaluation was not part of a plan to "set up" Jones for the upcoming RIF.

4. Jones has not shown that Bucy and Starkey shunned him or had negative attitudes about him because of his protected activity.

Jones argues that we should find, as the ALJ did, that following the transfer of the MIE program to Bucy in February 2000, Starkey and Bucy developed negative attitudes toward Jones because of his protected activity. Therefore, Jones claims that they rated him below Craven in the May 2000 RIF selection. Complainant's Response Brief at 24. USEC denies that Bucy and Starkey were negative toward or shunned Jones. Respondent's Initial Brief at 21-23. The ALJ concluded that Bucy "actively shunned" Jones after taking over the MIE program, and that Starkey was not credible and wrongly held Jones responsible for managerial shortcomings. R. D. & O. at 23-24, 34-35.

Jones testified about three interactions that demonstrated Bucy's negative attitude toward him. First, Bucy initially

helped Jones to transfer to the training department by introducing him to Starkey and Fowler. TR at 61-62. Later, when Jones asked Bucy what to do about the "below expectations" rating he received on the mid-year evaluation, Bucy advised him to take his protest to the employee concerns department. TR at 101, JX 1 at 26. But, according to Jones, when the employee concerns investigator later asked Bucy about the rating, Bucy nevertheless agreed with Starkey and Fowler that the rating should not be changed. CX 24-1. As a result, Jones felt that Bucy had "set him up." CX 24-1, 2. Bucy, however, testified that he advised Jones to take the issue to employee concerns only because they were the "people who take care of issues like that." JX 1 at 26. Furthermore, USEC's employee concerns manager noted that Bucy was correct in so advising Jones because managers are supposed to inform employees of their options. CX 24-2.

Second, Jones testified that Bucy was "not pleased" about being assigned to the MIE in February 2000 and became aloof toward him. He thought that Bucy gave the impression that Jones should not ask questions about the MIE program. TR at 114-16. Bucy admitted that he did not like having to fix problems that Fowler and Jones had created. JX 1 at 26. But Bucy also testified that his previous relationship with Jones did not change because of the transfer. JX 1 at 22. He added that he and Jones shared the same office area and talked regularly about safety and training problems, and if Jones had questions, he tried to answer them. JX 1 at 21-22. And Jones confirmed Bucy's account of their relationship when he told USEC's employee concerns manager that Bucy was giving him sufficient attention and direction. CX 24-2.

Third, Jones testified about an incident where Bucy told him to use some pages from OSHA's web site as Paducah's PIT training module. The information on the web site was

general in nature, and Jones resisted Bucy's idea. He correctly pointed out that the OSHA guidance itself indicated that it should not be substituted for a specific PIT module. Bucy became loud and angry when Jones did not carry out his suggestion. TR at 115; JX1 at 16. But Bucy later admitted that Jones was right about not "personalizing" the OSHA guidance. JX 1 at 17. And Jones conceded that the exchange did not result in discipline or impede him from trying to develop the training module correctly. TR at 234-35.

Thus, though Bucy may have been unhappy about the added responsibility of supervising Jones and Craven, and argued with Jones about the OSHA guidance, his interactions with Jones do not convince us that Bucy had a negative attitude toward Jones or that he shunned him. More significantly, even if Bucy's attitude could be deemed antagonistic, Jones has not adduced sufficient facts for us to infer that this enmity existed because of his protected activity.

Finally, Jones asserts that the ALJ correctly found that Starkey, too, was negative toward Jones because Jones had engaged in protected activity. The ALJ found that Starkey's testimony about Craven being more qualified than Jones was not credible, and that Starkey was holding Jones responsible for his own managerial shortcomings. R. D. & O. at 23-24. In so doing, the ALJ treated possible inadequacies in the quality of supervision Jones received as discrimination. Bad management, however, is not actionable under the ERA whistleblower protection provision. *Accord Jenkins v. United States Envtl. Prot.* Agency, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 40-41 (ARB Feb. 28, 2003). The whistleblower protection provision addresses only discrimination motivated by protected conduct.

5. Jones has not established that the USEC managers rated him below Craven because of his protected activity.

Jones argues that the method and manner that USEC used to conduct the May 2000 RIF evaluation proves that it was retaliating because of his protected activity. Furthermore, he claims that since the ALJ "effectively demonstrated the disparity between Mr. Jones's IRIF ratings and his supervisors' earlier ratings and comments," the ratings his managers gave on his RIF evaluation were not deserved, thus a pretext. Complainant's Response Brief at 26-27. USEC states that its RIF evaluation methodology and the consensus judgment of three managers in selecting Jones were fair and objective. Respondent's Initial Brief at 22. The ALJ characterized USEC's explanation of the RIF process as a "false premise," a "subterfuge," and "contradictory and defective." R. D. & O. at 38-40.

As earlier noted, USEC managers had decided that, as part of the 2000 RIF, the production training division had to downsize one employee. Thus, the choice was whether to terminate Jones or Craven, the only employees in that division. TR at 279-281. Senior management had determined the criteria by which managers were to rate employees for the RIF. TR at 282-283; JX 3 at 65, 70. USEC used 13 criteria, referred to as "competencies," to evaluate employees in the training division: comfort around higher management, creativity, composure, customer focus, managing diversity, integrity and trust, interpersonal savvy, listening, motivating others, personal learning, presentation skills, priority setting, and technical learning. CX 18. Each of these competencies was defined. For example, "creativity" was defined as "comes up with a lot of new and unique ideas; easily makes connections among previously unrelated notions; tends to be

seen as original and value-added in brainstorming settings." CX 21(b). Trainers were also rated according to two "functional/technical" job competencies: knowledge of federal, state, and Nuclear Regulatory Commission laws and regulations; and, knowledge and demonstrated proficiency in the systems approach to training process. CX 18.

Jones contends that USEC "blindsided" him because these criteria "were designed to monitor and evaluate an employee's progress through a company" and worked best "when the company informs the employee of the competencies beforehand" rather than when deciding whether to terminate employment. Therefore, continues Jones, since he was never informed he would be evaluated according to these factors, the criteria were "hidden" and we should infer that the method USEC used to rate him was "subjective," thus a pretext. Complainant's Response Brief at 25; TR 159-161, 235-237.

But the record contains no evidence to support Jones's argument that the purpose of the competencies was to inform employees what was expected and to train them on how to achieve the competencies. In fact, USEC specifically adopted and used the competencies in case it had to evaluate which employees to consider for an involuntary RIF. TR at 282-83. And, again, even more to the point, Jones adduced no evidence that USEC applied these competencies because of his protected activity. Therefore, we find that when USEC used the 13 defined criteria and the two functional/technical criteria, it employed a legitimate method to rate Jones and Craven.

Nor do we find evidentiary support for Jones's contention that the manner in which USEC managers conducted the May 2000 RIF evaluations demonstrates retaliation for his

protected activity. The record establishes that Starkey, Bucy, and Fowler, the managers who knew Jones and his work, "privately" and "independently" filled out the Candidate Selection Worksheet containing the trainer rating criteria. TR at 284-85. Each had the list that defined the competencies. CX 21(b). Shortly thereafter, the three managers met and agreed how they should rate Jones and Craven on each of the competencies listed on the Worksheet. TR 286. Their consensus resulted in Craven's overall rating of 3.35 and Jones's 1.38. CX 18. Jones characterizes the process as a "sham tribunal" but presented no evidence to rebut the manner in which the USEC managers decided to rate Craven ahead of him. Complainant's Response Brief at 28. Therefore, we find that Starkey, Bucy, and Fowler utilized a reasonable and fair process to evaluate Jones and Craven.

Finally, to further his argument that his 1.38 overall RIF rating was unwarranted, Jones again relies upon several of the ALJ's findings. The ALJ found that "the rating of Mr. Jones, of '1' in 'Integrity and trust,' to have been totally at odds with his prior evaluations, in particular that of his mid-year evaluation three months earlier . . . ." R. D. & O. at 38. [7] Along the same lines, the ALJ found that the USEC managers' consensus ratings for the "knowledge of rules and regulations" and the "creativity" criteria "contradicted prior ratings." *Id.* at 39.[8]

---

[7] Jones actually received a "2" rating for the "Integrity and Trust" competency. A "2" rating indicated "weakness" whereas a "1" meant "serious issue." *See* CX 18.

[8] Jones received a "1" rating for the "Knowledge of fed & state laws & regs (OSHA, A, DOT) & req'ments necessary for NRC cert" competency. A "1" indicated "minimum proficiency." He was rated "2" for "weakness" on the "Creativity" competency. *See* CX 18.

Close examination of the record, however, reveals that the low rating Jones received for the "Integrity and Trust" competency was not necessarily inconsistent with his mid-year evaluation. Prior to receiving his mid-year performance evaluation, Jones completed an "Employee Mid-Year Progress Assessment Input" form on January 12, 2000. CX 9. As previously discussed, this self-assessment form contained five performance factors, one of which is entitled "High Quality Human Resources." One of the components of this performance factor is "Ethics Program Compliance." Jones assessed his performance in complying with this component by writing: "No indication that ethics, honesty and integrity were in question." *Id.*

When Fowler later wrote Jones's mid-year evaluation in early February, he noted in the "High Quality Human Resources" performance factor section that Jones's "integrity and honesty are 'NEVER' of question." CX 10. It appears that Fowler may only have been responding to Jones's earlier self-assessment that, with respect to complying with the company ethics program, his "ethics, honesty and integrity" were not in question. In any event, Fowler was not rating Jones on ethics, or honesty, or integrity independently, but rather was evaluating ethics program compliance.

When Starkey, Bucy, and Fowler prepared the RIF Candidate Selection Comparative Summary three months later, however, they did rate Jones on "Integrity and Trust." This competency was defined: "Is widely trusted; is seen as a direct, truthful individual; can present the unvarnished truth in an appropriate and helpful manner; keeps confidences; admits mistakes; doesn't misrepresent him/herself for personal gain." CX 21(b).

While the mid-year report includes a component pertaining to complying with the company ethics program, it did not require that a supervisor evaluate an employee's integrity and trust as those terms were defined for the RIF summary. The fact that Fowler favorably used the words "ethics, honesty and integrity" in February 2000 and then three months later contributed to the low consensus rating for "Integrity and Trust" thus does not establish that Fowler was necessarily inconsistent in his judgment of Jones, let alone that he was retaliating because of protected activity. And even if Fowler had actually been rating Jones for integrity and trust on the February mid-year report, and not merely been responding to Jones's own assessment of his integrity, he was not overly impressed. Fowler gave Jones only a "meets goals/expectations" rating in the pertinent area of performance. Finally, since Jones's RIF rating for "Integrity and Trust" represented a consensus of the three managers, we cannot find that the consensus view was necessarily inconsistent with Fowler's earlier "meets goals/expectations" opinion, since the former rested on the assessments and experiences of all three and was produced following an opportunity for discussion, while the latter reflected Fowler's solitary experience and view at an earlier time.

Furthermore, the record supports the "2" ("weakness") rating for "Integrity and Trust." "Integrity and Trust" means, in part, that an employee "admits mistakes." CX 21(b). Starkey was unequivocal about his experience with Jones's shortcomings in this area:

> Q: Did Mr. Jones ever admit any mistakes to you, personal mistakes of his?
>
> A: No, sir. All I heard for the most -- I don't remember ever hearing that What I kept hearing was

> I can't do this. I don't have this. I don't have that. Nobody will help me with this. All I heard was just excuse after excuse after excuse after excuse.

TR at 287. Therefore, Jones's "Integrity and Trust" rating did not clearly contradict his earlier mid-year evaluation.

On the other hand, we agree with the ALJ that the USEC managers rated Jones too low on the "Knowledge of rules and regulations" functional/technical competency when they gave him a "1" ("minimum proficiency"). Craven received a "3" ("exceeds expectations"), the next highest rating above a "1." The record supports the ALJ's finding that Jones was strong in this area. R. D. & O. at 39; TR at 48, 50, 171-72. Similarly, a preponderance of the evidence supports the ALJ's finding that Jones demonstrated creativity. Thus, we find USEC managers rated Jones too low on the "Creativity" competency when they gave him a "2" ("weakness"). *See* TR at 87, 161-163; CX 4. Craven received a "5" ("towering strength"), and deservedly so. *See* TR 286-289; JX 1 at 50-51.

Nevertheless, the fact that the USEC managers unjustifiably rated Jones only marginally below Craven in one of the 15 RIF criteria and three grades below Craven in another category, in which Craven excelled, does not compel us to infer that USEC discriminated because of protected activity. *See St. Mary's Honor Center,* 509 U.S. at 511, 519, 524. To prevail, Jones still must show by a preponderance of the evidence that Starkey, Bucy, and Fowler gave him a lower overall RIF score than Craven because of his protected activity. Jones did not make this showing.

CONCLUSION

We **DENY** Jones's complaint because he has not demonstrated that USEC discriminated against him and thus violated the ERA. That is, Jones did not prove by a preponderance of the evidence that his protected activity contributed to USEC's decision to RIF him, rather than Craven. This record does not support Jones's theory that his managers set him up for termination by not training him properly, assigning Craven to the MIE program, ignoring him, and using an unfair, subjective method to evaluate him.

But even if Starkey, Bucy, and Fowler did not properly train Jones and did in fact shun him and unfairly evaluate him because they wanted Craven to run the MIE program, Jones would not prevail. He still must prove by a preponderance of the evidence that the USEC managers retaliated because of his protected activity, not because they preferred Craven. That USEC's reason for terminating Jones's employment might be unpersuasive or even "obviously contrived" does not mean that Jones succeeds here. "It is not enough . . . to disbelieve the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 509 U.S. at 519, 524. *See also Gale v. Ocean Imaging and Ocean Resources, Inc.*, ARB No. 98-143, ALJ No. 1997-ERA-38, slip op. at 13 (ARB July 31, 2002) (We are not a "super-personnel department that reexamines an entity's business decisions," citing *Morrow v. Wal-Mart Stores, Inc.*, 152 F. 3d 559, 564 (7th Cir. 1998)).

Finally, because we have ruled against Jones, we need not decide the Complainant's Motion for a Stay of Execution, Motion to Enforce ALJ Order, and Revised Motion to Enforce ALJ Order. We also dismiss ARB No. 03-010,

USEC's appeal of the recommended attorney's fee order, because it is moot.

SO ORDERED.

/s/_____
Oliver M. Transue
Administrative Appeals Judge

/s/_____
Judith S. Boggs
Administrative Appeals Judge

APPENDIX D

U.S. Department of Labor
Office of Administrative Law Judges
307 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202
(513) 684-3252
(513) 684-6108 (FAX)

No. 2001-ERA 21

[ISSUED June 26, 2002]

DOUGLAS JONES,
Complainant,
v.

UNITED STATES ENRICHMENT CORPORATION INCORPORATED,
Respondent.

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

ORDER AMENDING NOTICES TO EMPLOYEES

On June 21, 2002, a Recommended Decision and Order and Preliminary Order was issued by the undersigned in the above matter finding certain violations of the provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851. Pursuant to the implementing regulations that govern this matter at 29 C.F.R. Part 24.8, I ordered the Respondent to post Notice(s) to Employees, one of which was to be immediately posted under the terms of a Preliminary Order, and the other after review of the matter, if any, by the Administrative Review Board. On today's date, this office was informed by the attorney for Douglas Jones, Complainant, that the notices contained reference to a compensatory damage award of $40,000.00 as compared to the award set forth in the Recommended Decision and Order and Preliminary Order of $10,000.00, which is the correct compensatory damage award. The Recommended Notice to Employees attached to the Recommended Decision and Order should have contained reference to the correct amount of $10,000.00, while that of the Preliminary Order should contain no reference to the compensatory damage award at all. Therefore,

IT IS ORDERED that:

1. Paragraph 6 of the Recommended Notice to Employees attached to the original Recommended Decision and Order be amended to read, "WE WILL immediately pay Mr. Jones the amount of $10,000.00 in compensatory damages;" and

2. Paragraph 6 of the Notice to Employees attached to the original Preliminary Order be amended to strike the

provisions of paragraph 6 in its entirety, and thereafter renumber the successive paragraphs as 6 through 10.

3. The effective date of the Recommended Decision and Order and the Preliminary Order be amended to be this 26th day of June, 2002.

A
THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED NOTICE TO EMPLOYEES

IN THE MATTER OF:
DOUGLAS JONES

V.

UNITED STATES ENRICHMENT CORPORATION

CASE NO. 2001-ERA-21

POSTED BY ORDER OF THE
ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
AN AGENCY OF THE
UNITED STATES GOVERNMENT

After a hearing in which the parties had the opportunity to present evidence, the Administrative Review Board, U.S. Department of Labor, has found that the Respondent, United States Enrichment Corporation, Paducah Gaseous Diffusion Plant, has violated the law in its treatment of the Complainant, Douglas Jones and has ordered the posting of this notice.

Having found that Mr. Jones' complaint has merit in that USEC has violated the employee protective provisions of the Energy Reorganization Act, 42 U.S.C. Section 5851; and the implementing regulations appearing at 29 C.F.R. Part 24.1, and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Jones whole and to compensate Mr. Jones for them within the ERA, therefore, it has been ordered that certain actions be taken to

abate the effects of those violations, concerning which it is directed that the following action be taken:

1. WE WILL cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Douglas Jones for his protected activity under the ERA;

2. WE WILL immediately reinstate Mr. Jones to his former position as trainer at the USEC Paducah Gaseous Diffusion Plant;

3. WE WILL immediately pay Mr. Jones his full back pay for all time lost due to his change in position, plus benefits and pension contributions, to include, $13,000.00 in back pay for the three months that he was totally unemployed due to the layoff, plus $5,000.00 difference in pay for 24 month a from the time of his layoff in July 2000 through June 2002, plus monthly payments thereafter at the rate of $208.33 per month as otherwise ordinarily calculated and paid by USEC until all of the provisions of this decision and order are in full compliance therewith, plus pension fund benefits and other benefits, if any;

4. WE WILL immediately pay Mr. Jones lost pension contribution payments and benefits;

5. WE WILL immediately pay Mr. Jones 2 days lost pay, plus any other lost time, while involved with the various phases of the litigation;

6. WE WILL immediately pay Mr. Jones the amount of $10,000.00 in compensatory damages.

7. WE WILL immediately pay Mr. Jones interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;
8. WE WILL immediately expunge Mr. Jones personnel file of all adverse personnel actions and comments regarding allegations against him made as a result of his transfer to the training department in 1999 and his layoff therefrom in July of 2000;

9. WE WILL immediately post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Plant, for a minimum of 90 days;

10. WE WILL immediately address a letter to the appropriate offices of USEC and all other governmental agencies and subcontractors that Mr. Jones has been cleared of all allegations against him made as a result of his transfer to the training department in 1999, and his layoff from USEC in July of 2000, and that the letter include a copy of this order and preliminary order;

11. WE WILL pay Mr. Jones his attorneys fees and costs of litigation.

13. WE WILL immediately post a notice consisting of copies of the attached notice and preliminary order on all employee bulletin boards at its USEC Paducah Gaseous Diffusion Plant;, for a minimum period of 90 days;

APPROVED, this __ day of _____, 200_.

_____
Chief Executive Officer
Paducah Gaseous Diffusion Plant
United States Enrichment Corporation

NOTICE TO EMPLOYEES

IN THE MATTER OF:

DOUGLAS JONES

V.

UNITED STATES ENRICHMENT CORPORATION

CASE NO. 2001-ERA-21

POSTED BY PRELIMINARY ORDER OF THE ADMINISTRATIVE LAW JUDGE UNITED STATES DEPARTMENT OF LABOR AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which the parties had the opportunity to present evidence , the Administrative Review Board, U.S. Department of Labor, has found that the Respondent, United States Enrichment Corporation, Paducah Gaseous Diffusion Plant, has violated the law in its treatment of the Complainant, Douglas Jones and has ordered the posting of this notice.

Having found that Mr. Jones' complaint has merit in that USEC has violated the employee protective provisions of the Energy Reorganization Act, 42 U.S.C. Section 5851; and the implementing regulations appearing at 29 C.F.R. Part 24.1, and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Jones whole and to compensate Mr. Jones for them within the ERA, therefore, it has been ordered that certain actions be taken to

abate the effects of those violations, concerning which it is directed that the following action be taken:

1. WE WILL cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Douglas Jones for his protected activity under the ERA;

2. WE WILL immediately reinstate Mr. Jones to his former position as trainer at the USEC Paducah Gaseous Diffusion Plant;

3. WE WILL immediately pay Mr. Jones his full back pay for all time lost due to his change in position, plus benefits and pension contributions, to include, $13,000.00 in back pay for the three months that he was totally unemployed due to the layoff, plus $5,000.00 difference in pay for 24 month a from the time of his layoff in July 2000 through June 2002, plus monthly payments thereafter at the rate of $208.33 per month as otherwise ordinarily calculated and paid by USEC until all of the provisions of this decision and order are in full compliance therewith, plus pension fund benefits and other benefits, if any;

4. WE WILL immediately pay Mr. Jones lost pension contribution payments and benefits;

5. WE WILL immediately pay Mr. Jones 2 days lost pay, plus any other lost time, while involved with the various phases of the litigation;

6. WE WILL immediately pay Mr. Jones interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

7. WE WILL immediately expunge Mr. Jones personnel file of all adverse personnel actions and comments regarding allegations against him made as a result of his transfer to the training department in 1999 and his layoff therefrom in July of 2000;

8. WE WILL immediately post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Plant, for a minimum of 90 days;

9. WE WILL immediately address a letter to the appropriate offices of USEC and all other governmental agencies and subcontractors that Mr. Jones has been cleared of all allegations against him made as a result of his transfer to the training department in 1999, and his layoff from USEC in July of 2000, and that the letter include a copy of this order and preliminary order;

10. WE WILL pay Mr. Jones his attorneys fees and costs of litigation.

APPROVED, this __ day of _____, 200_.

_____
Chief Executive Officer
Paducah Gaseous Diffusion Plant
United States Enrichment Corporation

APPENDIX E

U.S. Department of Labor
Office of Administrative Law Judges
307 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202
(513) 684-3252
(513) 684-6108 (FAX)

No. 2001-ERA 21

[ISSUED June 21, 2002]

DOUGLAS JONES,
Complainant,
v.

UNITED STATES ENRICHMENT CORPORATION INCORPORATED,
Respondent.

PRELIMINARY ORDER

Since I have found that Mr. Jones' complaint has merit in that USEC has violated the employee protective provisions of the Energy Reorganization Act, 42 U.S.C. Section 5851 and the implementing regulations appearing at 29 C.F.R. Part 24.1, and that the above order contains the relief prescribed in 29 C.F.R. §§24.7(c)(1), I hereby issue this order as a

preliminary order providing for immediate implementation of the following actions to abate the effects of the violations consisting of all of the "make whole" relief set forth above, as follows:

IT IS ORDERED that,

1. Respondent USEC cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Douglas Jones for his protected activity under the ERA;

2. Mr. Jones be immediately reinstated to his former position as trainer at USEC's Paducah Gaseous Diffusion Plant;

3. Mr. Jones receive full backpay for all time lost due to his layoff, plus benefits and pension contributions, to include, $13,000.00 in back pay for the three months that he was totally unemployed due to the layoff, plus $5,000.00 difference in pay for 24 month a from the time of his layoff in July 2000 through June 2002, plus monthly payments thereafter at the rate of $208.32 per month as otherwise ordinarily calculated and paid by USEC until all of the provisions of this decision and order are in full compliance therewith, plus pension fund benefits and other benefits, if any;

4. That USEC pay lost pension contribution payments and benefits in the following amounts: either payment of direct contribution to the pension fund for his time lost at USEC due to his termination , or payments of direct compensation in lieu of those payments tpo be calculated as follows: (1) The amount of the periodic contribution, plus, (2) A prorated calculation of the earnings of the pension fund times the amount so contributed on his behalf to his USEC pension

fund, to be paid directly to him for the purpose of investing in the Complainant's own retirement fund, if any, or to be utilized at his own discretion, if he has no other such account.

5. Mr. Jones receive 2 days lost pay, plus any other time lost, due to the various phases of the litigation, including pay for lost time due to such matters as attending depositions and preparation for this hearing;

6. Where applicable, that Mr. Jones receive interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

7. Mr. Jones' personnel file be expunged of all adverse personnel actions and comments regarding allegations against him made as a result of his transfer to the training department in 1999 and his layoff therefrom in July of 2000;

8. Respondent post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Plant, for a minimum of 90 days;

9. A letter be addressed to the appropriate offices of USEC and all other governmental agencies and subcontractors Mr. Jones has been cleared of all allegations against him made as a result of his transfer to the training department in 1999, and his layoff from USEC in July of 2000, and that the letter include a copy of this order and preliminary order;

10. Mr. Jones is awarded his attorneys fees and costs of litigation, concerning which I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order. Requests for attorney travel and expenses

must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

IT IS SO ORDERED.

A
THOMAS F. PHALEN, JR.
Administrative Law Judge

U.S. Department of Labor
Office of Administrative Law Judges
307 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202
(513) 684-3252
(513) 684-6108 (FAX)

[ISSUED: June 21, 2002]

CASE No.: 2001-ERA-21

DOUGLAS JONES,
Complainant,
v.

UNITED STATES ENRICHMENT CORPORATION INCORPORATED,
Respondent.

RECOMMENDED DECISION AND ORDER AND PRELIMINARY ORDER

This proceeding arises under the employee protection provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851. The implementing regulations that govern this matter appear at 29 C.F.R. Part 24.1-9. Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with

regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes. The hearing, and this decision and order, are also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

On January 17, 2001, Mr. Jones filed a complaint of discrimination under Section 211 of the Energy Reorganization Act. The complaint was investigated and, on April 8, 2001, was found not to have merit. On May 4, 2001, Complainant, through counsel, requested a formal hearing in this case. Pursuant to an order of the undersigned dated July 11, 2001, the hearing in this case was held on October 23 and 24, 2001, in Paducah, Kentucky. (ALJX 12) [1] The parties were represented by counsel and were given an opportunity to present evidence and arguments, and to file briefs in the matter. Briefs and reply briefs were timely filed by the parties. After considering all of the documentary and testimonial evidence, and the arguments and briefs of the parties, the following is my recommended decision and order.

ISSUES

1.Whether respondent committed adverse action against complainant in response to protected activity under the ERA.

2. What damages and remedies, if any, the complainant is entitled to as a result of the actions taken by respondent.

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[1] References to the exhibits of the Administrative Law Judge, and the Joint, Complainant and Respondent exhibits, and to the official transcript will be designated, "ALJX", "JX", "CX", "RX" and "T" with the exhibit or page number following the designation

FINDINGS OF FACT

Complainant, Douglas Jones, herein called "Mr. Jones," "Jones" or "Complainant," was hired in July of 1988 by The Lockheed Martin Utility Services (LMUS), the predecessor to the United States Enrichment Corporation, herein called, " the Respondent," "the Employer" or "USEC" at the Paducah Gaseous Diffusion Plant (PGDP) in Paducah, Kentucky.[2] He worked there continuously to his July 2000 lay-off at issue in this case. Prior to that time, he had worked as an air monitor for the Kentucky Division for Air Quality. This followed receipt of a Bachelor of Science degree (major: biology; minor: chemistry) at Murray State College in 1978, and his Kentucky teaching certificate.

At the Paducah Gaseous Diffusion Plant (PGDP), U235 isotope mined uranium is processed from 2% to 5% for use in nuclear reactors to produce energy. The mined uranium comes out of the ground as ore in an oxide form. As a first step in its processing, it is converted into a uranium hexaflouride gas (UF6) at another location, and is transported to one of two locations where it is "enriched"; one at PGDP, the other at a similar USEC, Portsmouth, Ohio facility. From there, the enriched UF6 is shipped in cylinders to a fuel fabricator where the metallic part of it, the enriched metallic uranium, is extracted and fabricated into fuel pellets in fuel rods for commercial reactors. The PGDP also receives some

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[2] In October of 1997, the company "Privatized" and USEC took over as a private, publicly held, company. The biggest change was the accountability and how it worked, which was formerly to the government and then being a company in business for itself, accountable to the shareholders. The biggest change was managing the budget to a private business, to maximize the company's value to the shareholders.

Russian uranium for blending redistribution for commercial reactor fuel.

This production process is governed by numerous health and safety regulations including those of the Nuclear Regulatory Commission (NRC) and the Occupational Health and Safety Commission (OSHA). Mr. Jones held various environmental, air monitoring and other positions at the PGDP of USEC until February 1985, when he was promoted to Support Services Department Manager in the Safety and Health Department, where they conducted environmental audits and internal audits in the plant to insure compliance with environmental safety and health rules and regulations.

Manager of the Training Department, Russell Starkey[3] testified that the uranium business was changing; that enrichment prices were down, and that market forces were flat in uranium demand for the foreseeable future. This resulted in a series of reductions-in-force (RIF), both voluntary (VRIF) and involuntary (IRIF), that either directly or indirectly affected Mr. Jones over his last three years of employment.

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[3] Russ Starkey testified that he had a Physics degree from Miami of Ohio, with graduate work at the University of New Haven, Connecticut and North Carolina State toward an unfinished MBA. He also trained in the Navy Nuclear Power and Nuclear Weapons Programs, and started work at the USEC Gaseous Diffusion Plant in October of 1997, when it was under the control of Lockheed Martin Utility Services for the U.S. Government and the Department of Energy. Initially, he was hired as a general consultant to the General Manager, Steve Polston, performing on several projects, and then running the training department from April of 1998 to April of 1999

In 1998, Mr. Jones was transferred to the Independent Assessments Department, as the result of a statement that he made to Division of Safety and Health Manager, Steve Shell, that he wanted to avoid the first VRIF recently announced to the employees. While he initially did not request to go to there, he did so even though he was not qualified as a lead auditor. His new primary duties consisted of performing audits in the plant to insure compliance with the NRC rules and regulations. USEC as a "license holder" [a licensee] of the NRC, is required to maintain certain standards for license certification. He contributed to that certification process by reviewing the Safety Analysis Reports (SARs), and submitting the necessary applications and reports for activities there, to maintain that license.

Mr. Jones received overall satisfactory ("effective performance") evaluations on his 1996-1997, 1997-1998 and 1998 -1999 performance reviews.

When Mr. Jones learned that there would be another RIF in April 1999, he also found out that the person in charge of the Resource Conservation and Recovery Act (RCRA) training class, Bill Henderson, intended to take the VRIF leaving a possible open position in the training division. On inquiry, his impression was that employees appeared to be "adequately" trained in safety matters, so he applied for the position.

Mr. Starkey became aware of Mr. Jones' interest in training when Jones made overtures to individuals in the department after the VRIF had been announced. Jones first interviewed for the training position with Danny Bucy, Group Manager in the Training division, who was in charge of training records. He also learned that, in addition to the RCRA program and process safety management, the position

resulting from the vacancy would include training other employees in the mobile industrial equipment (MIE) program. He also determined that Ron Fowler[4] would be his supervisor, there.

Mr. Jones believed that the training would fit his skills, so he talked to Mr. Bucy,[5] and Mr. Starkey about the program and his credentials. Jones had both Bachelor's and Master's degrees, a lot of environmental experience, having worked in the quality area, and a teaching certificate. With these and a scuba diving teaching certificate obtained as a hobby, he appeared qualified for a trainer position in the training program. He had also attended a 40 hour instructor training course in another area in 1988, and had received an on-the-job training development class in 1990. (RX 2) In addition, he

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[4] Before his employment at USEC, Ron Fowler was a Nuclear Consultant from 1969 - 1991, beginning his employment there on December 9, 1991 as a Trainer in Health Physics (Radiological Protection). At the time of his deposition on August 23, 2001, he was Group Manager of Production Support and Compliance Training for OSHA, EPA and NRC regulations. He supervised the MIE/PIYT training program from 1997 or 1998 through the Winter of 2000, where he supervised Mr. Jones for four months from the end of 1999 through the end of the winter 2000. (JX 2)

[5] Mr. Bucy was employed at the Paducah Gaseous Difusion Plant in 1968 when it was operated for the U.S. Government by Union Carbide, and has been there ever since. He was a Technical Trainer before that, in which he developed training material for electricians, since he had previously had an electrical background. As Group Manager, he became the manager of the trainers about three years before the hearing, and was assigned the commitment tracking system for them. Mr. Bucy gave a deposition, which was admitted into evidence as a joint exhibit, in lieu of testimony at the hearing. (JX 1)

attended a forklift training course at Shawnee approved by the Instructional Technologist, Don Gregory, after his transfer. These resulted in a waiver of any requirement for formal training as a trainer. (At that time, he could have gone into the training department but not as an instructor without the waiver.) However, his mutually agreed Performance Plan (RX 2) stated that he was to complete training enhancement plans and completion of the training procedure rewrite schedule.

Mr. Jones testified that he did not know of the complexity of the MIE program, and had not been trained in, nor did he know how to operate any of, the MIE equipment in the plant.[6] However, he agreed to take the assignment anyway, and to teach it. His general instruction from Mr. Fowler was to work with Bill Henderson before his VRIF, for which Mr. Henderson was given a one month extension of his separation to train Jones on some of the equipment. He stated that he was told not to "perturb" Henderson or he would not cooperate before the VRIF.

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[6] Although this was an inaccurate statement regarding not being able to operate any of the MIE equipment, when he had received instruction in prior years on the operation of forklifts, and he had received some other instructor training in another area other than MIE, I find that these exposures were early in his career long before his transfer; that there is no evidence that he actually operated forklifts or any MIE to any extent; that this was not sufficient training for the operation of overhead cranes and the UF6 cylinder haulers, and that was certainly insufficient to train him as a "trainer" on all of this MIE equipment. While it did raise an issue on his credibility as a witness, it did not affect my final determination on the merits of the issues leading to his layoff that he was a credible witness.

The record is devoid of evidence that any of the existing conditions about both his general teaching qualifications or specific lack of mobile industrial equipment or powered industrial truck qualifications were somehow hidden from management. It is management that hired Mr. Jones into this position. It was first and foremost the responsibility of management to account for his success or lack of it in the new position. It is a basic principle of management that you may delegate authority, but you cannot delegate responsibility.

When Mr. Jones had a chance to observe Mr. Henderson teaching some of the courses, he got an "inkling" that there were problems in the program in that the "objectives" of the training were not being set forth. For instance, no one failed Henderson's classes; therefore, none would have to be "remediated." Jones concluded that training was inadequate; that it was marginal, and, in some cases, the "training modules" for heavy industrial equipment were out of compliance with the regulations.[7]

Mr. Henderson did provide hands-on training for Mr. Jones on the forklift, the overhead crane and the self propelled work platform and other pieces of equipment. Jones testified that they got into the crane and rode it back and forth for about 15 minutes, and Henderson gave him a card saying that he was certified in it. He also picked up an empty basket from the C600 crane, stopped it from swinging, and set it down, but did not lift with the C720 crane. Besides what they did with the cranes, operators also picked up heavy weights,

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[7] Mr. Jones testified that after Mr. Henderson had retired, Henderson and Jones had a meeting with Mr. Fowler, and Henderson stated that, "the program was in disarray and he said there's no way one person could fix that program by themselves..." (T 174) This remained undenied by management witnesses.

moved them, and then put them down - which he did not do. While Jones testified that the training obligation under OSHA merely require that overhead cranes be operated by "designated people who are properly trained," he believed that they could not meet safety requirements with the training that he received, nor should they send people into the field with that sort of practice. This would apply not only to other types of Powered Industrial Trucks , or "PIT" trucks, including any type of motorized equipment used to lift, pull, stack or tier material, primarily forklifts , but also to cylinder haulers and industrial crane tow motors. (CX 16B) Jones complained to Mr. Bucy about Henderson, although he did not feel that Henderson falsified records.

Later, Mr. Jones showed Mr. Henderson a new OSHA regulation that was effective December 1, 1999, and asked if he was aware of it. Henderson said that he was, and showed him a letter from Mr. Shell, written by Industrial Hygiene and Safety employee, Georgetta Riddle, stating that the plant was essentially in compliance, except for a few things that were taken directly from the rules, such as the requirement that every three years, the operator had to be reevaluated. (On questioning Riddle, Jones found out that she had secured the information on the letter from Henderson anyway). Jones then filed an ATR[8] on May 13, 1999.

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[8] The ATR program, Mr. Starkey testified, is a corrective action program, in which problems in the plant are identified, formally documented, and subject to a procedural follow-through by developing action plans, completing them, and creating conditions so that the problems do not reoccur. Mr. Jones confirmed that Messrs. Starkey and Fowler never directly criticized him for filing ATRs, and, in fact on occasions, encouraged him to write them.

Mr. Jones' first written ATR (CX 26), stated that the retraining module did not comply with the new rule. It was also the first ATR involving PITs, and concerned the fact that OSHA had changed its regulations when Mr. Henderson was still in the Plant. The new regulations were to take effect on December 1, 1999, and Jones wanted a tracking mechanism implemented to get the PITs "OSHA-compliant" by that date. In response, Russ Starkey and Ron Fowler assigned him the task of revising the rule.[9] (This was a typical response of USEC to matters raised by Jones: Management's first response appeared to be to address the matter back to the complaining party to, as will be seen below, "fix it.") As an additional consideration, Jones was working for Fowler in August of 1999 when the ATR was filed, and he had informed Fowler of a concern that his own training had been in violation of a regulation governing trainers known as the T-DAG. Fowler acknowledged this fact and confirmed that he (Fowler) was not qualified to operate PITs - which would also have been a violation of the regulations.

Mr. Jones testified that one of the "road blocks" encountered by him at the start of his new appointment was that the "Training the Trainers" course was under revision, and that he did not receive it until it became available in March 2000, ten months later (and two months before he was rated for IRIF) , despite his requests to do so early in his transfer. (He confirmed that the March 2000 course was the

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[9] Another ATR filed by Mr. Jones on December 9, 1999, (CX 26, No. 28) noted management's direction that he file it, which he confirmed in his testimony, and concerned, first, the fact that there was no plan approved for OSHA compliant forklifts or other PIT training modules, and second it concerned overhead crane problems. This was an ongoing issue that he originally identified and documented in ATRC 994940, his original one discussed above

first time it was offered after his 1999 transfer, which does not affect my evaluation of management's failure to either set up a program for him or to find one someplace else. Again, this was management's responsibility, and not that of Jones.)

This trainer training course was under what was called a Systems Approach to Training (SAT) procedure, which was for the more sophisticated nuclear sensitive types of training. Covered in it were jobs that did not specifically include MIEs and powered industrial trucks, (PITs). (PITs, consisting of forklifts, mobile work platforms, cylinder haulers, etc., constituted a sub-category of the MIEs, while overhead cranes would be considered under the more general MIE classification.) A training course for MIEs would, therefore, be considered a "non-SAT" course.

When Jones was transferred, despite the fact that there may have been procedures available that were used in the non-SAT areas such as operating MIEs, I credit his testimony that there was no specific non-SAT training procedure or course available to train the trainers teaching non-SAT job training.

However, there is something that I do not understand: The USEC original Safety Analysis Report (SAR) was explained by Mr. Jones to be what USEC provided to the NRC on how it was going to insure public health and safety, and to comply with NRC rules and regulations. Section 6, page 6.6-1 through 14 of the SAR-PGDP was offered and admitted into evidence, requiring training programs and setting the standards for organization, supervision and review of programs governing the actions of USEC management officials first and foremost, and then Mr. Jones, who worked under their supervision. (JX 5) Section 6.6.3.1. thereof lists job positions/worker classifications that require certain training programs, and states: "On site transportation of UF

6 is covered by SAT-based training for tasks assigned to selected personnel within the programs listed in Section 6.6.3.1." However, not included in the list are workers who would be specifically classified as MIE/PIT operators. In spite of the fact that this was not explained at the hearing, I would have believed that any workers routinely assigned the task of on-site transportation of UF 6 would also be subject to the requirement that they would be covered by SAT based training. Since both parties in this case appear to have accepted the fact that MIE/PIT training was not governed by SAT-based training, I must accept that as fact, even though I do not understand it, and will act accordingly.

Also, since the UF6 cylinders are moved by a class of MIE/PIT vehicles known as cylinder haulers, without stating what other such vehicles might have had the capability of handling such containers, or what other vehicles might have handled other radioactive materials, I would also have thought that all such operators should at least be prepared for the eventuality of such on site transportation, and would have been trained accordingly, using SAT procedures.

Again, these were not explained at the hearing, by either party, so I must make my own conclusions on the matter, but only to the extent that it may affect the outcome of the case. It does not but it lends strength to Jones' position that the MIE/PIT's should have been governed by the SAT procedures and the TRG.

Jones confirmed that Respondent did have SAT procedures available for other areas, and they were a little more complicated in that they deal with nuclear safety involved in the direct nuclear operations of the Plant. Despite that fact, and that such procedures could have been "looked at" by him anytime prior to the Spring 2000 resumption of the

revised train the trainer course, and despite the additional fact that Respondent also maintained that there was a non-SAT training procedure available in that there were some individual non-SAT procedures utilized by USEC at the PGDP available to, or known by Mr. Jones,[10] I find that none of these were of timely or meaningful assistance to Jones in completing his initial MIE training modules. The reason is that there was insufficient evidence presented by Respondent that the procedures in existence were either effectively organized for use in the MIE program, or that those in existence were OSHA compliant for the training of MIE/PIT operators.

One of the important SAT requirements was for the mandatory formation of a training review group (TRG), made up of employees who either performed or supervised the actual work that would be covered by the training in a particular department, known as "Subject Matter Experts" (SMEs), and who would meet to specify details needed to be

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[10] When asked by the undersigned whether it was not the case that all other procedures other than SAT procedures would be considered non-SAT procedures, Respondent's attorney stated that in the face of the statement that there were no non-SAT procedures, he would establish that there were some procedures in effect to help write a training module and present courses in the non-SAT area. That may be so in a general sense, but after hearing all of the evidence, I credit Mr. Jones' testimony that there were, in fact no designated non-SAT procedures in effect at the plant concerning the PIT/MEI modules that he had been directed to create. While somewhat of an ingenious theory, I find it disingenuous to conclude that a collection of possible procedures constituted a "non-SAT procedure." Therefore, I have concluded that no such procedure existed, and "that the only procedures available were all SAT related," as testified by Mr. Jones.

covered in a training course. This involved another "road block" encountered by Mr. Jones concerning a problem with Department Manager, Diane Snow because she did not want to form a TRG for PIT modules. Since Jones had not received any training in writing a training module, he consulted Instructional Technologist, Don Gregory, who trained trainers.[11] Gregory told him that the PIT training module should not be decided by the writer, but by a TRG consisting of a chair from the Industrial Hygiene and Safety group. This being an OSHA rule, the person in charge of which was Division Manager Shell, the Department Manager, Snow, would have been the Chair. Gregory suggested that Snow form a TRG, even though one was not ordinarily required for a non-SAT training module. Snow responded that she was not required to form such a group, and would not do so. She maintained that it was neither necessary nor helpful. However, Gregory testified that for Snow's group, a TRG was such an "option," and he also confirmed that a TRG "would maybe be best practice."[12] In the end, the module did not get written then, and Jones did not get disciplined at the time, although he was later accused of dragging his feet and taking a long time making progress. Upon further questioning, Jones confirmed that not setting up a TRG group made his job harder, but did not make it impossible to proceed with the PIT module renovation. Later, a January 18,

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[11] Mr. Gregory worked at the plant for 27 years. There is no other background, educational or employment information on the record before his employment at USEC.

[12] In addition, Gregory verified Jones' OSHA research, but could not recall some of the details of the Bucy matters.

2000 e-mail from Jones to Mr. Fowler, verified that Snow did help Jones form an action plan for it. (RX 2)[13]

By confirming that the lack of a TRG "made the job harder, but not impossible," to a question by the Respondent, I find that the answer was an uncontested verification of Jones' position that it was management that caused the delays in getting the training module completed. It is also my opinion that Snow's help on the "action plan" was too little, too late, in relation to the delay caused by her in not cooperating with the TRG suggestion at the outset.

It also appears that when Snow was later reassigned, a person amenable to TRGs, Group Manager Bucy, took over the program. A TRG was formed and progress was made on defining PITs and writing the the module. Jones testified that various communications with management verify this type of problem in completing the module, and the need for a new training program for it. (CX 3, 4 and 5)

In the end, the position of Mr. Jones on the necessity for a TRG was completely verified by the February 2000 discussion between Mr. Starkey and Mr. Jones when he finally told him that his first action should be to form a TRG.

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[13] Mr. Jones testified that the term "action plan" is "a list of sequential steps put together to solve some problem and reach some kind of end or conclusion"; that he was asked to prepare an action plan but could not recall specifically whether it was for revising the PIT training module or fixing the whole training program, that he was assigned the PIT training module in May 1999, and was expected to provide an action plan for it. He did know how to form an action plan, at that time.

At the end of 1999, an accident with the overhead crane resulted in an assignment to Mr. Jones involving the review and revision of the overhead crane training module. With help from Mr. Gregory, he formed a group and did the revisions. Gregory testified that they formed a task analysis group to define how to operate a crane and to perform rigging operations. He said that Jones and he "got along fine;" that "he was very attentive to it;" that "he worked well with him," and that "he took it and went with it."[14]

As the months went on, Mr. Jones stated that prior to February 2000, he would relate problems to both Mr. Fowler and to Mr. Starkey about the frustrations and roadblocks he was encountering in his attempt to get the MIE module and PIT module implemented. Fowler would say, "Good work. You have the opportunity to excel," or something like that, with "zero guidance." Starkey would say, "Your doing a good job discovering these problems. Now go and fix them." Finally, when he was practically begging for help on how to begin an action plan on the MIE, Jones testified that Starkey told him that his first action should be to form a TRG; then to review the procedure on mobile equipment and its licensing and certification procedure, and then said "to really review that procedure." Mr. Jones testified that he considered this repetitive guidance without specifics to be "inane," and he and Fowler "had a bit of a chuckle about such inane

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[14] I was somewhat confused by some of Mr. Gregory's testimony. He appeared very definite on his own background and job, and quite satisfied about a number of activities when dealing directly with Mr. Jones. However, he became quite vague, and unable to recall specifics, when it came to verifying the problem areas between Jones, Snow and Bucy. For this reason, I do give his deposition testimony limited weight.

guidance." [15] I credit this testimony of Mr. Jones as a universal response of USEC management when he raised an issue.

In this vein, a confrontation arose over employees of a subcontractor not being properly trained in self-propelled work platforms because neither their training, nor the overhead crane procedures, met a new revised OSHA procedure. (CX 6) Mr. Starkey responded to Mr. Jones' e-mail on the subject, advising him to: "Keep on looking. It appears you have a marvelous opportunity to excel!!!!!!!!!" Jones testified that this "opportunity" for him to "excel," was without giving him guidance to do so, and with the number of exclamation points after the comment noted by him, Jones obviously considered this to be a somewhat sarcastic, and less than serious, reply. (CX 6) Again, I credit this testimony and his reaction to it as legitimate.

Mr. Fowler finally agreed to the purchase of training videos on the matter, for which Jones requested a review by Georgetta Riddle, the OSHA expert on Diane Snow's staff. Riddle first indicated that she would go with his view, and then, on again asking her to review it, she exploded, stating: "I don't give an ...(explitive). " However, she finally did review the videos, after they came in.

As a result of the above, and his lack of progress in fixing it, Mr. Jones decided on his own that he would do better if he

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[15] "Inane" - "without sense or substance." (Webster's II, New Revised University Dictionary.) As applied to the subject that Mr. Jones had raised, I agree that the reply was "inane." At the very least, it is an indication that his legitimate e-mail on the lack of regulatory compliance of the overhead crane modules with the OSHA regulations was not being taken seriously.

moved into a different job in training in environmental compliance, and sent a memo on January 10, 2000, to Mr. Fowler (CX 8) requesting that he be removed from the mobile industrial equipment program module. In it, he recounted his own lack of training on creating modules for MIE training, and on the unhelpful responses from Mr. Starkey. (CX 8) He thought it would run more smoothly if someone else ran it; that it was affecting, not only his work, but his morale; that he did not enjoy going to work as he had previously, and that, while he did not think that they intentionally impeded it, that, at one time, he had been instructed by Mr. Bucy to take the administrative pieces on the OSHA guidance and "use that as a module," which was prohibited in the regulation. (Bucy later confirmed in his deposition, that "personalizing" the OSHA regulation to the plant, such as Jones wanted to do, was the appropriate way to do the PIT training module.)

Starkey testified that he said no to Mr. Jones' transfer request, since he did not have a place to put him, and he had been brought explicitly into the training department to do what he had been assigned to do. Jones testified that he remained in the program at that time; that he was essentially forcibly removed from the program later on, and that he had said that the forcible removal would not do his career any good.

On February 3, 2000, Mr. Starkey met with Messrs. Bucy, Fowler and Jones, and told Jones his progress was inadequate since he did not have an action plan in two months; that he had not met the schedules, and that he was moving the leadership from Fowler to Bucy "to change one of the variables that he was trying to assess," to get Jones adequate direction and leadership, and to get the MIE program more closely aligned with maintenance activities than it was. Starkey pointed out that he had rated both Jones and

Fowler below expectations in the MIE program area, in his "midcycle review," since it was not clear to him that Fowler was giving Jones "adequate direction." However, he attributed 80% to Jones and 20% to Fowler for the failure to complete a module. Starkey testified that while Jones had raised his lack of training and experience to him, Jones did not assume personal responsibility for them, so he remained unhappy with him. I discredit Starkey on this allocation of blame, since he acknowledges knowledge of Jones' lack of experience and training; gives him the higher percentage for the problem, with 20% to Fowler, and allots none of the cause/effect percentage to himself.

Mr. Starkey's testimony regarding his unhappiness with Jones ultimately begged the question of the extent to which his lack of training and experience involved severe safety matters that were being legitimately raised by Jones, and not resolved by either Fowler, Bucy or even Starkey himself, which I find substantially contributed to the real cause of the lack of success of the program. Starkey's allocation of blame turns the managerial obligation on its head, when both the selection of Jones and the failure to get him safely and adequately trained lay squarely on the shoulders of management.

On that same day, Mr. Jones addressed an e-mail to Messrs. Bucy, Starkey and Fowler over confusion about his supervision by Fowler being transferred to Bucy. (CX 27) Later that day, a handwritten note by Department Manager Ron Wetherell appears on the February 3 e-mail from Mr. Jones addressing continuation with Fowler on all issues except MIE, for which he would report to Bucy; that this would be for a few weeks until another person could be transferred into the MIE position; that thereafter, Jones would continue to work for Fowler; that Jones was not happy about this; that Jones had requested the reassignment and that it was denied

and that Wetherell had not been able to act upon it then. (CX 27) It also confirms a meeting with Jones, Bucy and Fowler, with Starkey not mentioned.

Mr. Wetherell's note then characterized Jones' responses at the meeting as having offered a lot of excuses about problems in the program and not being able to generate a training module for the mobile industrial equipment program for over two months, without stating what they were, or examining or evaluating them. Wetherell stated that he had seen no attempt by Jones to learn what he needed to learn to do so; that there was no excuse for not being able to write a training module with literally thousands of modules available to model one on; that, again, he had seen "no movement" on it, and that Jones had said that he agreed with what was being said. (CX 27) He then directed Fowler and Jones to develop a performance plan for Jones, together, and told them that he wanted it, "very detailed." At the end of the meeting, when asked for comments, Wetherell wrote that Jones stated, "I have nothing constructive to offer." Wetherell confirmed that when Jones stated a concern that this would hurt his career, Wetherall told him that it already had. (CX 27, p. 3)

At this point, I find it hard to reconcile the fact that Jones, by Wetherell's own wording, had "offered a lot of excuses," yet that there was no evaluation of the points that Jones had raised, and he simply concluded that there was no excuse for Jones not being able to write a training module in two months. Of course, Jones had nothing further of a constructive nature to offer. What he said about his own lack of experience and training in doing so, and the points that he had raised about getting the job done, had been rejected as mere "excuses." Wetherell totally failed to perceive the managerial/ supervision problem in all of this.

Reasons set forth by Mr. Jones as a basis for his request to reassign him as stated in his January 10, 2000, letter were then repeated by him in his own January 12, 2000, Employee Mid-Year Progress Assessment form (CX 9), and were then used negatively by Fowler in his February 7, 2000 evaluation. On the January 12 form, Jones noted that his request to have the MIE program transferred was denied, and that he had remained performing the duties previously described, without the necessary training and expertise that he had raised. Mr. Starkey testified that Jones never requested training on MIE modules. In the Progress Assessment form Jones specifically stated: "[N]eed training as instructor/developer to effectively correct problems in mobile industrial equipment program." (CX 9) I find that Jones did request training.

In Mr. Jones' February 7, 2000 evaluation by Ron Fowler, his signature withdrawal of which appears as a strikeout therein, that should be dated February 8, 2000, (CX 10)[16] he received an "M" (Meets Expectations) for taking on a challenging program, with numerous areas to excel. However, Fowler stated that he was having difficulty with the "large program" (the MIE program), but that he was "trying," and did a "thorough and accurate job when ... looking up information and regulations." Other comments noted deadlines met; stated that he "communicates well", and found his "integrity and honesty" to be "never in question." It also complimented the fact that "he admits his areas of weakness and strives to overcome them with his new responsibilities," and stated that "more time is reqd (sic) to overcome weak areas." However, Fowler gave Jones a "B" (Below Expectations), noting that he had been "working

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[16] Not January 12, 1999, February 7, 1999 or February 8, 1999, as incorrectly stated in the transcript. (T 98)

towards the correction of a problem he inherited .... but is needing help." (CX 10)

Mr. Jones did not agree with the "B" rating in relation to what had been previously stated and told that to Fowler. A "post-it" note from Fowler attached to the evaluation, confirms what Jones said at the bottom of the evaluation, where Jones drew a line through his signature, added the date: "2/8/00" and wrote, "I don't agree with assessment & am going to meet with Employee Concerns to resolve this issue." He then signed "Douglas Jones 2-8-00" (CX 10) At the hearing, I acknowledged that the inconsistency within the "B" description, in which Fowler appears to recognize the blame for the problem as a company problem, which Jones "inherited."

When the February 7 evaluation was received by Mr. Jones, he was told by Ron Fowler in an e-mail that he was to submit to him "a plan for his new non-mobile duties." In forwarding Fowler's e-mail to Ron Wetherell, Jones stated that it was not a plan required whenever a "B" has been received but was merely to establish his new duties, and repeating his responses and objections to the evaluation, after which it "would be reevaluated by all those involved." (CX 16)

The resulting unsigned draft memorandum of February 8, 2000 from Mr. Jones to Mr. Fowler (CX 24-4) was discussed by them as a possible plan, but was not formally submitted. It specified improvement of various training programs due to his change of job duties, including Resource Conservation Recovery Act (RCRA) training, respirator training, process safety management and other training including that which had been discussed with Fowler in a memorandum from Jones

to Wetherell dated February 9, 2000. (CX 24-3)[17] In response, he stated that he had already drafted a plan, which was the above February 8, 2000 unsigned, unsubmitted memorandum (CX 24-4) but that he was not going to agree to Bucy's plan because of its vagueness, the conflicting information being received, and the fact that it was not an official performance plan. (CX 24-3) [18]

As will be seen, the significance of the February 8, 2000 draft plan, which was neither formally submitted nor adopted, was that it emphasized management's own disarray in the treatment of both Jones and the entire MIE program. It is my opinion that throughout February through April 2000, Fowler, Bucy and Starkey were unable to agree on what the Plan should be; that they were unable to deal with Jones on the matter with what he had been raising in terms of the safety issues that he had presented, and that they welcomed the "out" that was provided for them by the layoff. They seized upon by it in the May IRIF evaluation, even though, by May, Jones had virtually completed the training module.

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[17] This followed a conversation with Bucy in which Jones discussed his understanding with Starkey that he had directed Fowler to insure that he and Jones completed performance plan discussed above. Bucy told Jones that he had discussed it with his staff, which Jones questioned as contrary to what Fowler had told him, since the "performance improvement plan and commitment" (PIPC) was not supposed have been an "official" PIPC , but rather was being used to give him a plan on the suggested changes

[18] Although I stated at the hearing that I would only give limited value or weight to this document due to its lack of completion, (CX 24-4) I do take note that it was used or referenced in its incomplete form in the discussions with Mr. Wetherell as a basis for what they talked about, rather than for the fact of what they ultimately agreed to do or not to do, and is given some weight due to that fact alone.

A February 9, 2000 meeting between Messrs. Starkey, Fowler, Bucy and Jones resulted from a request of Jones due to the receipt of conflicting information on his reporting obligations, as documented in the e-mail, reflecting Mr. Wetherell's handwritten notes of February 3. When told by Starkey that the program would be removed from Fowler and given to Bucy, he then said Jones would be in it for a couple of weeks, then it would be assigned to someone else in the plant. Otherwise, the direction from the meeting never occurred. Jones remained in the program, and he continued to report to Bucy. In response to a question from the undersigned about whether he had ever had a follow-up conversation to that of February 9 about the move and its effect on his career, he stated not that he could recall, and that he did feel that it had damaged his career because he did not get the program corrected as management desired.

Following the transfer of the program to Mr. Bucy from Mr. Fowler, Mr. Jones testified that Bucy was not pleased about it. Jones told Bucy that he had found an OSHA website "guidance" on how to devise a compliant PIT module. Bucy went to the website, printed the guidance and told Jones to print the front five or six pages and use them for the PIT modules. Jones had seen the OSHA guidance and stated that he could not use it as a substitute for a PIT module because it must be specific to his own plant, "as the one I eventually created was." Jones resisted this, and felt that Bucy took it as an act of insubordination. Bucy, "became very angry" for not doing it, which resulted in a "loud argument" right outside his office, which was witnessed by several others. Mr. Jones stated that he then broke off the argument, and went to Instructional Technologist Gregory, since Bucy was his supervisor, and told him that he did not think that Bucy knew what he was talking about. There is no evidence of any other such argument or explosion between Jones and any of the

supervisors involved in this matter, and I saw no evidence that it had been reduced to writing as any sort of a personnel action.

Mr. Bucy, however, was angry, both at Jones and at having been given another task to do. He hung a sarcastic note on his door, stating: "Danny Bucy in charge of maintenance training, mobile industrial equipment, training equipment ..." and then a blank to fill in. Bucy, Jones testified, then became "aloof" toward him, and gave him the impression that he did not want him "in or around his office..." After that, Jones saw no benefit in asking questions or for guidance from him. Thereafter, Bucy appeared "cool" (not "cruel" as incorrectly reported in the transcript. T 234 - 235) toward Jones, rating him lower for the layoff, even though there had been no reprimand or other adverse action at the time of the incident. Bucy testified in his deposition that he did not like the fact that a program that was operating normally was given to Fowler and Jones, and then went into PITs; that no one was getting trained, and that it was then turned over to him to "fix." Notwithstanding Bucy's reaction, Jones stated that he proceeded at that time to finish what he was doing the lawful way.

Mr. Jones filed an employee concern over the evaluation on February 9, 2000, repeating his objections to the "B," and restating his MIE assignment and lack of MIE training. (CX 11) He testified that it was Mr. Bucy who advised him to do so, and verified that on the Employee Concern Intake Statement, he also wrote: "If we don't put an adequate mobile industrial equipment training program in place, our employees' safety is at risk." (T 101-102) The document shows that he did so, checking "Yes" where it asked whether a safety issue was involved. (CX 11) This was clearly protected activity.

Mr. Bucy confirmed in his deposition that when called by Employee Concerns over Jones' "B" rating on the evaluation, that he told the investigator that he did not feel that Jones had received the proper instructions because he never knew how to do anything as far as work in the other areas he was working in. (*i.e.* In other words, the MIE/PITs.) He stated that Jones did not know the forms to use, and that he did not feel that he got the proper instructions for developing PIT modules. This statement did not appear in the results of the Employee Concern investigation as later reported by Mr. Wetherell. (JX 1, Bucy depo. p. 28)

In a memo of 3/15/00 from Mr. Jones to Mr. Wetherell, which set forth who he would report to (Bucy), Jones testified that Mr. Starkey had said that Ron Fowler "could have provided ... better guidance as a manager to fix the mobile industrial equipment program." (T 107) Jones repeated what he had previously told Wetherell, and had stated in his Progress Assessment (CX 9), that at no time during the period covered by the evaluation was his performance called into question, and there was no documentation to that effect. (CX 23, Item #1) He also repeated that: (2) he had accepted the MIE duties not knowing the complexities of the program or the depth of expertise that would be required to correct them; (3) he had approached management on these and was merely told to "fix the program"; (4) he had been freely admitting his shortcomings with the program, and was told to form a TRG (Training Resource Group); (5) the program owner was not in favor of a TRG, and was not required to do so; (6) he was "waived" for the requirements of instructor/ developer, yet required to do those duties; (7) when he approached an Instructional Technologist (Trainer's trainer) for assistance, he was told that the content of programs should be defined by the TRG; (8) having him develop the MIE program, or anyone presently employed in training, was a violation of a

specific OSHA regulation, and (9) summarizing, he was told to "fix" the program without the proper tools and guidance. (CX 23)

However, in a full responsive memorandum from Mr. Wetherell to Mr. Jones on April 4, 2000 regarding investigation of both his evaluation and related employee concern, (CX 25) Wetherell referred to their February 9, 2000 meeting on the evaluation, the transfer of Jones to the Training Organization in April 1999, and Jones' assumption of the MIE program in July 1999. He repeated that Jones had cited his lack of MIE experience and insufficient guidance and their not sending him to the Training Developer class as resulting in his "B" rating in the "Other" evaluation category involving job knowledge, initiative and interpersonal skills criteria. The concern had been referred to Bill Thompson in Human Relations (HR) to consider the "B" rating, and Messrs. Fowler, Bucy and Starkey were interviewed. It was the opinion of HR that even though he did not attend the writing/developer training module he, "did not demonstrate the initiative expected from an employee" in his labor grade. The report faulted Jones for taking over two months to create an action plan, that resulted in having to obtain an ATR extension. It stated that other procedures and training modules were referred to for his use but not utilized, thus impacting this adverse view of his initiative. Consequently, HR did not recommend any change to his mid year appraisal. Wetherell agreed, after interviewing Starkey and citing Jones' college degree, teaching certificate and availability of training modules to use as models. Of interest is the fact that while Starkey agreed with HR's conclusions, he did feel that Fowler could have provided better management direction. In closing, Wetherell recommended that Jones work "diligently" on his PIPC during the balance of the year to eliminate his "B" rating, and that he utilize the employee concerns program in

the future, even though he was not successful in its current use. (CX 25) Wetherell did not mention Bucy's view of the lack of training and preparedness of Jones for the PITs assignment, or the reasons that Jones had raised, branded by him as "excuses" without further evaluation.

However, Mr. Jones testified to a March 30, 2000 document addressed to Mr. Wetherell from HR's Bill Weber, to whom the employee concern of Mr. Jones was referred by Mr. Thompson. It purportedly stated, with Jones confirming his attorney's reading of portions of the document into the record without substantive objection, that "Jones was trained by his predecessor, but the magnitude of the problems with inadequate MIE training modules was unknown to Jones and not communicated to Jones by his predecessor. (T 127-128) [19] The document then goes on to state that, "Jones was given two months to create an action plan but did not do so," without evaluating the effects of the prior statement.

Another memorandum involving the Employee Concerns program was addressed to Mr. Starkey by Mr. Wetherell on May 16, 2000. It enclosed a questionnaire concerning the program in which Mr. Jones had criticized the program earlier that week. (CX 24) In it, Jones disagreed that the program had helped him and strongly disagreed that he would use it again; writing, in part: "I was encouraged by one manager (Bucy) to file this concern 'against' the other two managers" and, "when I was given the results was told that

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[19] The document does not appear as a numbered exhibit. However, the uncontradicted quotes from it drew no objections from the Respondent's attorney and he later confirmed the document's inclusion in a package provided to Complainant's attorney prior to the hearing. The quotes are, therefore, accepted as presented into evidence, and given the appropriate weight.

the manager who encouraged me to file the concern, supported the position of the other two managers." He was then assigned to report to the first manager who made the recommendation to file (Bucy, again), and stated that he "completely shuns me. - acts like he doesn't want me in his office." (CX 24, p. 2) Wetherell directed Starkey that whether true or a misperception, "either situation should be corrected." Starkey was directed to investigate it and to take the appropriate corrective action, advising him of his action in writing. (CX 24, p. 1)

The last of this series of memoranda was sent by Mr. Wetherell to Mr. Jones on June 15, 2000. (CX 24-2) It recounted correspondence from Starkey of June 9, 2000, in response to his May 16, 2000 memo to Starkey, and an e-mail from Jones of June 1, 2000, about the concerns meeting with Wetherell. This resulted in a June 12 meeting between Mr. Weber of HR, Wetherell and Jones, regarding the belief that Bucy had set Jones up, inducing him to file the employee concern. Wetherell defended Bucy, stating that it was management's responsibility to inform employees of their options. Jones stated that he still felt misled, and that he would not have filed if Bucy had simply told him that he was wrong. Otherwise, while Jones stated that he felt that he was receiving necessary direction and attention, he still objected to management's view that he should have been able to develop MIE training modules on the PITs in the time prescribed. In conclusion, Wetherell repeated that based on Weber's (HR's) review, he could not change his evaluation. (CX 24-2) Again, I find that the chinks in this armor of contradiction, and self-protective back-peddling, are significant. There seems to be acknowledgment of the lack of training, which would have had to involve facial OSHA violations, and a refusal to place the responsibility for the failures in the program where they belonged - at the top. In

addition, it is my opinion that Bucy should have warned Jones that, while he was encouraging him to file a concern, he did not agree with Jones' position on it.

I do not give much weight to the HR report's conclusions as objective. It is my opinion that the HR Committee did not properly evaluate the alerts that were being provided by Mr. Jones on the condition of the MIE training program, and the lack of training and safety and health conditions that were being raised by him. They merely mimicked the opinions of management while overlooking the failure of management to properly assess its role in the failure to have a timely training module, and then blamed their oversights on Jones. The only people that HR talked to were Messrs. Fowler, Bucy and Starkey, and not Jones. The "investigation," if any, involved circular reasoning, relying on the very people who gave the rating in the first place. The result could only have been the same on the "B" rating, which I find to ~~have~~ been unwarranted, and based upon the prior statements in the evaluation.

With regard to there being hundreds of training modules available to utilize as examples, as stated by Mr. Wetherell in his February 3 handwritten note on the e-mail from Mr. Jones to Messrs. Bucy, Starkey and Fowler, Jones testified that there were training procedures that showed one how to develop a training module, but they applied to SAT based training (Systematic Approach to Training) and not to non-SAT based training, which is what they were doing with the MIE/PIT training, and which is so stated right in the procedure. As a directive on what to do, Mr. Gregory had simply told Jones to form a TRG, which is an approach of the SAT procedures, not a task or job analysis needed in these particular matters concerning PITs. Using the UF6 cylindar haulers as an example, Jones testified without contradiction,

that they hauled cylinders of uranium hexafloride (UF6) with them, and that one could be dropped, broken and cause release of UF6, causing it to be inhaled, with an immense safety concern. He compared the suggestions being given to him on creating a written module by referencing hundreds of modules training available to utilize as examples, to flying a plane, giving the flight manual to the pilot trainee, and telling him to go fly the plane using the documents, and not having been actually trained on the equipment.

Mr. Jones testified that he followed the program written by Mr. Fowler as agreed to by him on March 15 as a "program" but not a PIPC. This resulted in his being assigned to Mr. Bucy to work on the development of MIE module "full time," meaning six months or longer, spending 100% of his time on it. Jones testified that while this was a satisfactory solution to the problem at the time, since it was around the time that he had received his MIE training, in fact he also continued to provide training in environmental compliance (RCRA) as there was no one else to provide it.

Simply because it was questioned by management witnesses, I find that Mr. Jones was subjected to pressure to complete a training module as well as an action plan, and that this did not cure the factors that contributed to the timeliness problem which was created by management.

Mr. Jones testified that notwithstanding all of the problems encountered, he did complete the MIE mobile program module, (The Plan) as shown in the Training Module Approval Sheets on April 5. It was approved through the above review process, and went into effect on May 18. (CX 16B) Complainant's Exhibit 16B contains the actual module, and 16A contains the overhead projections used in classroom training, presenting the module. Both CX 16A and CX 16B,

submitted by the Complainant are the same duplicates of the Training Module Approval Sheet form, with the effective date of "5-18-00" and signed by Mr Jones on "4-5-00".[20] Complainant's Exhibit 16A contains the handouts on the industrial hygiene and safety procedure for PITS, and then the actual OSHA regulation itself for PITS. Mr. Jones actually did "put on" training sessions utilizing these procedures, forms, handouts and slides.

USEC trainees who participated in the training modules run by Mr. Jones filled out evaluation forms concerning his training, rating him from "NI", needs improvement "S" for satisfactory, "G" for good and "E" for excellent, and these ratings were given computer numbers 1 - 5 to do so. In addition, "N/A" meaning "not applicable," was marked on a number of forms and scored as a zero ("0"), and was entered into the computer that way. Forty-nine completed evaluations about Jones' training sessions were submitted by USEC to him a few days before the hearing. On those, of numerous ratings in various categories, he received only two NI's, one on each of two of the forty-nine separate forms, and both of which contained all other G's and E's. Mr. Gregory wrote on the form that he had scored better than that by all other applicants and saw no other problems with the issue. While Jones found it necessary to explain the totaling or averages

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[20] Review and approvals of the module appear throughout by Messrs. Riddle, Booker, Bucy, Potter, Reed, Perry (#2) and Booker (#2) on the dates of April 7, 13, 17, 27, and 10, 2000, May 3, 2000, April 27, and April 13, respectively.) A later Training Module Approval Sheet submitted by Mr. Craven on June 16, 2000, and reviewed and approved by others thereafter in a manner similar to Mr. Jones, there were specific references to the nuclear safety and handling requirements and training specific to the site. (CX 17)

that appeared to be a lower average when the N/A's and zeroes were calculated, I asked for confirmation that there were a number of S's but the high preponderance of ratings seem to be in the G and E columns, which he confirmed, and was not contradicted. (T 147) There was no contradiction to this summary and I so find.

Summarizing the ATR's filed by Mr. Jones, between May 13, 1999 and May 8, 2000, eleven ATR's are recorded as having been filed concerning operation and training of USEC employees and employees of USEC subcontractors on industrial mobile equipment at USEC. These included applicable OSHA regulations governing training and operation of powered industrial trucks, forklifts, self propelled work platforms and overhead cranes and other such equipment near "energized areas" of USEC. Three of the ATRs are the same one, but are recorded as having been assigned and resolved by three different managerial groups. (CX 26) Seven filings, including the one that was resolved by three managers, were filed before Mr. Jones requested an assignment change on January 10, 2000, (CX 8) and two were filed after that date. All specified one or more of the above violations of OSHA Regulations, and all had to be corrected, except one OSHA regulation which was determined to have been revised and did not require the action requested by Mr. Jones. (See, CX 26, pp. 236, Item # 27)[21] For instance, in one ATR of 12/9/99, explaining the explicit OSHA regulation shortcomings stated therein, referring to the ATR Summary he testified that he had been providing instruction in the mobile industrial equipment program and was licensed to operate a forklift and

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[21] I find that these ATR's all involved written reports by Mr. Jones concerning the safety and health of both the employees of USEC, and ultimately of the public, and constituted protected activity under the provisions of the ERA.

overhead crane and self propelled work platform, but was never enrolled in the program through health services as required by Section 6.1.1 of CP2TRQP 1030. (CX 26, p. 237/ Bates Page 984) There is no question about the legitimacy of these ATRs or the fact that they constituted protected activity, known to USEC.

One ATR involved powered industrial trucks (PITs). Mr. Jones was responsible for upgrading the module, with first, one deadline, then a subsequent one, and later a compliance deadline. Mr. Starkey asked him to file an additional ATR on it, to get the action plan and corrective process scheduled and resolved. Jones determined that there had been a desire at USEC to upgrade the MIE program and equipment for years, as demonstrated in a prior ATR discussed by Starkey. However, he testified without contradiction that from the time Jones arrived in the department in April 1999 to August 1999, Mr. Henderson advised against finding those problems and fixing them. When Henderson left in August, however, Jones was actually assigned the task of revising the MIE/PIT module. During that same time period, he testified that it was not as though he was sitting idle; he was performing training, and was in contact with Industrial Hygiene and Safety and the internet looking for examples and module packages that he could buy, and, as above stated, he did submit other draft modules.

The Layoff:

Mr. Jones testified that he first learned that he would be subject to an involuntary reduction in force (IRIF) on July 5, 2000, although the rest of the plant was informed that there would be an IRIF on June 27 or 28, and he was off from work. He said that Mr. Fowler called and told him to report to Mr. Starkey's office, where he was told by Starkey that he

was "being IRIF'd." When Jones asked if it was due to his performance, Starkey said, "No." Jones then went to Fowler's office, told him of the action, gathered his belongings and left in Fowler's truck when he offered a ride to the gate.

Regarding the cause of the layoff, Mr. Starkey testified that meetings with senior managers resulted in the need for additional, significant reductions in costs. Thirty percent would be in personnel, with a number being allocated to both the Portsmouth and the Paducah plants, including two to the training department at Paducah consisting of one trainer and one non-exempt employee. Either Mr. Starkey's secretary or a records clerk had to be one to go from the non-exempt area, and one in the production support training area, which encompassed MIE. Since they expected the demand for such training would drop in a year or two to one half of a full time employee, that became the choice.

Respondent had adopted an elaborate procedure for rating candidates for layoff. Some 67 criteria, called "Competencies," were developed for consideration in rating those candidates, (CX 18 - 20) with the advice of an outside consultant. USEC's Candidate Selection Comparative Summary, the IRIF evaluation form, listed as the candidates for RIF with that current description, "Edwin C. Craven" and "Douglas W. Jones," with the job position titles of "Trainer, Technical," as "position 91." It showed that the final ratings for that department were "run" on May 23, 2000. (CX 18) Mr. Starkey testified that they utilized "objective criteria to make a subjective process more objective" to rate the candidates, employing a list of 67 "Competencies" to do so, with the help of a consulting company. In the selection process, direct division level managers from various portions of the plant were assembled on two teams; half from Paducah

and half from Portsmouth, who were then assigned to one or the other plant. Each were allocated job classifications to evaluate. Mr. Wetherell was in the group for trainer positions. The Competencies were then utilized to evaluate trainers, among other employees. This resulted in the job profile ratings of the candidate selection summary. (CX 18) Mr. Starkey confirmed in his testimony that he got with the managers, Bucy and Fowler, to discuss Mr. Jones and Mr. Craven, that the consensus rating of the competencies of the two, were made as objective as possible, recognizing that they were, "dealing in a subjective area."

Mr. Jones testified that he did not hear any explanation from Mr. Starkey as to what the above criteria meant as set forth in the Listing of Competencies of 2/13/01. (CX 21) Reviewing the worksheet for the layoffs, Jones testified that he did not agree with those ratings, based upon a comparison with the evaluations that he had received, and the fact that he did not know about them beforehand. On a scale of 1 (lowest) to 5 (highest) in the "Job Proficiency" category, he received no 5s, 4s or 3s, but received only 1s and 2s, (CX 18) which the previous, comparable mid year evaluation levels do not appear to have warranted.[22]

Mr. Jones felt that the layoff ratings were a fiction or pretext that were not true or accurate. He used several examples, in none of which he was ever told they would involve criteria for being laid off. These included he following "Competencies " the most egregious of which were all rated a low "1" or "2" on the scale of "5": "Creativity" -

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[22] Job Profile: 5) = Towering Strength; 4) = Talented; 3) = Skilled; 2) = Weakness; 1) = Serious Issue. Functional/ Technical Ratings: 5) = Towering Strength; 4) = Exceeds Expectations; 1) = Minimum Proficiency; 0) = Not Proficient.

(Mr. Jones was never told by management that he was not being creative, and in fact was told that the modules he created were good.); "Customer focus" - (He was never told that he did not have customer focus.); "Integrity and trust" - (He was never told that he could not be trusted or did not have integrity. In fact, it was the opposite on his midyear evaluation by Mr. Fowler, in which Fowler stated that his integrity and trust were never in question.); "Interpersonal savvy" - (Jones was never told that he lacked interpersonal savvy, and gave examples of how he obtained information from the workers, such as the overhead crane operators, on how to operate cranes by telling them that he knew nothing about operating cranes, was completely dependent on them for the information, and thus built rapport with them to get the information necessary to build the module.); "Listening" - (This also applied to his previous example.); "Priority setting" - (He was never told that he had difficulties in setting priorities. In terms of the goals that were jointly set up by Fowler and Jones, Jones testified that he, in fact, kept up with the tasks and priorities that were set on March 15.) and Knowledge of Federal and State Laws and regulations and requirements necessary for the NRC - (Mr. Jones testified that in his opinion, that was his strength.)

With regard to "Integrity and Trust," Mr. Bucy responded that he did not know the criteria that was used in the meeting regarding this rating. (He responded similarly, that he did not know the criteria, to several of the other ratings. A leading question on redirect examination, asking whether, if he had the definitions in front of him, his ratings would have conformed to the definitions, did not rehabilitate his answers. For one thing, he was not shown those definitions, which I assume were in the 67 criteria, so he never reviewed what was in the definitions for the answer. The blanket answer was an interesting foundation question, but required a more direct

review of the criteria.) He stated that he did not tell Messrs. Starkey and Fowler that he could not trust Jones; that he was a man of low integrity, or that he was dishonest.

Further discussing the Competency on "Creativity", Mr. Jones read aloud that it stated: "Comes up with a lot of new and unique ideas. Easily makes connections among previously unrelated notions. Tends to be seen as original and value added and brainstorming sessions - settings." He testified, without contradiction, that he did away with the training course calling safety procedure overview that had been in place as a worthless course, taken every three years for license recertification, but consisting only of forklift and crane as a classroom course. Once the TRG was formed for the MIE/PIT training module, he suggested various ways to comply with OSHA regulations to insure compliance and benefit the plant. The only brainstorming sessions (not "settings" as stated in the transcript - T 201 - 202) that he could recall were ones that he had done in the TRG, while there were none with management. He stated that he asked questions, but there was very little brainstorming going on. Basically, the OSHA regulations did not require retraining, but did require documentation that they were trained, which is how they determined that they were in compliance. For instance, he did the research on that, and reported it to management; he would take the published OSHA interpretations for a piece of equipment A, and then apply those to equipment B to make an analogy so that they could use the same interpretation on both, and management reacted favorably to these.

Mr. Bucy acknowledged that the PIT module created by Mr. Jones was the first PIT module developed there. Still, he rated him a "2" in the competencies for his creativity, but could not remember the criteria used for that. When asked, he

said that there was a negative comment from the maintenance department on the module, but could not remember the source; nor did he make a written record of it. He also confirmed that they had never had the program rewritten, implying that it was still in use. I conclude that this rating was unjustified by Mr. Jones' performance, and not otherwise explained by management witnesses.

On "Customer focus", Mr. Jones confirmed what appeared to be an ongoing issue between level of training and compliance with the law. For instance, in explaining the necessity for a the level advocated by Mr. Jones, the person running the TRG would take what he said into consideration to determine what was a PIT and what was not. He was never aware of any issues between management and him in the environmental area. As an example he met with the waste management official, and reviewed its training module for compliance, and was favorably received. Again, this testimony was uncontradicted.

It was the contention of Mr. Jones in his testimony that there is a necessity that one know in advance how they are going to be rated or graded for layoff so that one could work toward those objectives, and that while "Integrity and Trust" was also listed for the scheduled evaluations, and "Interpersonsl skills" in the evaluations could be interpreted as, "Personal savvy," in the Competencies, he was unaware that he would be rated on the rest of the Competencies as he later learned of them. While Jones maintained that the Competencies rated for the layoff (CX 18) should not have been implemented for his job, "unless you've been told beforehand," he conceded that they otherwise might have been appropriate if you were just making up the form, "from scratch", to evaluate people. I agree with this assessment. However, the employees should have been so informed,

particularly because there might have been variances in the definitions of the competencies versus the areas covered in the evaluations, and that there might have been other areas to have been evaluated.

Mr. Jones satisfactorily rejoined queries on the following Competencies: "Comfort around higher management," "Composure," "Customer focus," "Integrity and Trust," "Personal learning," "Presentation skills," "Priority setting," and "Technical learning," and the extent to which he viewed those areas as encompassing various sub-areas of criteria and his agreement or disagreement on both what they encompassed and the respective ratings. (CX 18 & 20)

I credit and give great weight to Mr. Jones comparison of the "Competencies" to the scheduled evaluation ratings, and otherwise give his testimony great weight. I give little weight to the testimony of Mr. Starkey on these points, based upon my preceding determinations regarding his testimony concerning the treatment of Mr. Jones after his transfer into the training department, in particular with regard to Jones' raising of safety issues in his own inexperience and lack of training, which I conclude were primarily managerial responsibilities, being foisted onto Jones.

Mr. Craven and Mr. Jones were the two whose names came up on the layoff candidate selection sheet, (CX 18)[23] and the end result, according to Mr. Starkey, was that Craven was rated higher than Jones. He said that Jones "does good" as an instructor, but that "Craven is an excellent instructor"

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[23] Mr. Starkey verified that there was no way that Mr. Jones could have known that he was in the IRIF pool, and could produce no documentation that Jones was in the pool in 1999.

and that Craven was more composed with his interaction with managers, thus reflecting the low marks given partially for his knowledge of regulations, integrity and trust; very good with customers, and a hard worker, and complimenting Craven's integrity and trust. Starkey admitted that both had a lot of technical knowledge, with Craven picking things up and running with them, while he felt that Jones did not. He rated Craven better than Jones on setting priorities, which was reflected in getting out the action plan, and rejected the complaints of Jones that he was not given the opportunity to train on mobile equipment, stating that he had multiple opportunities to do so. Starkey testified that he had assigned Craven to help Mr. Jones (just before the layoff evaluations), since Craven had more experience, and a demonstrated ability to take such programs from the ground up. (Mr. Bucy confirmed that Craven started in the PIT program at the same time that he did, which would be in February 2000, one month before the ratings for the layoff began in March 2000.) There is, however, no evidence that Craven participated in the MIE/PIT program with Jones and the supervisor before the layoff. Mr Starkey ended by stating that Craven presently (at the time of the hearing) spends one half his time on the MIE program, and one half in others, such as health physics and operations training and noted how effective Craven had been since the layoff.

Mr. Starkey testified that when he met with Mr. Jones to tell him of the layoff, Jones asked if it was "performance based." Starkey said that it, "was not;" that it was not "for cause," and that if it was, he would not have needed an RIF to do so. He stated again, that, "It was a business decision based on - as objective an evaluation process as the company could devise to meet the its business needs. He denied that it was quite the contrary, noting the problems with the MIE program brought to attention by him, and his "chagrin" was

in not moving fast enough to resolve them, which was his "whole responsibility," which he had just stated was 80% the responsibility of Jones, and 20% Fowler. Again, it is my conclusion that this is reversed, and an attempt to hold Jones responsible for managerial responsibilities, without any attribution to Starkey, himself.

When Mr. Starkey was asked whether there was a barometer in the trainers' cases such as that for a secretary typing so many words per minute, he stated that the Competency rating process was a "consensus" process; [meaning that when a consensus of the joint management team agreed on a rating, that was what the candidate was given.] When asked what that barometer was for that in Craven's case, Starkey then used anecdotal evidence of Craven's actual performance after his transfer to the MEI/PIT module project as a verification, stating that the module that he used was the cylinder hauler training module. He proceeded to confirm that although the signature on it was Craven's, the module "may well have been" the preparation of Mr. Jones. (CX 17) Despite Craven's signature on the module, Jones testified without contradiction that he also prepared the cylinder hauler training module. The module included identifying the OSHA regulations related to the actual haulers used at USEC. Mr. Starkey's testimony is simply not credible on his explanation of Craven's superior performance. Since this was all Jones' work, it could not credibly stand as a verification of what Craven had done after Jones' IRIF.

Mr. Starkey testified that while one half a full time employee (Mr. Craven) then did the MIE program after the IRIF, he did not know whether it was a safe practice to have only one half an employee assigned to the MIE training.

Mr. Starkey confirmed that it was supervision that had to insure that employees performed their duties; that Jones' supervisor from April 1999 to March 15, 2000 was Mr. Fowler, that there was no documentation that Jones was to do only the MIE training; that training was only supposed to be done for new MIE employees; that the RIF of Henderson necessitated assignment of all his work to someone else; that he was aware of an NRC finding that employees were performing in an atmosphere that had affected the use of ATRs; that he did not recall use of the word "chilled" or "chilled environment;" in connection with that investigation, and that the program had to be "improved so that folks would be more comfortable using the employee concerns program." In other words, it was not unreasonable for Jones to conclude that the objection to his use of the employee concerns program compared to his own results was confirmed.

Mr. Jones confirmed that Mr. Bucy was one of the managers who rated him for layoff; that, just two weeks prior to the layoff; the last correspondence between Mr. Wetherell and Mr. Weber involved Jones' employee concern on the training modules discussing his feeling of that Bucy had set him up in suggesting that he file the employee concern in the first place, and that Bucy then did not back him on it, and that, shortly after that, he was laid off. I can only conclude that this credibly creates a timing issue that must be resolved favorably to the benefit of Jones, and so find.

When asked whether any shortcoming of his own contributed to his lack of making significant success, Mr. Jones answered, "No," and added that he was given the job and told to do it when he was not adequately trained, and that there was a tremendous safety issue, there, to which Mr. Starkey merely replied, "Fix it." The answers to the questions on the Competencies posed by Respondent, were all the ones

previously set forth as the problem areas in the letter of Mr. Jones on January 10, 2002 in which he responsibly requested that the MIE duties be transferred from him. (CX 8) (While I believe that the "No" is an overstatement on the part of Jones, born, perhaps, of the changed atmosphere from that of the MIE/PIT area to the more academic/scientific side of the plant's business, the fact is that he did learn; that this is reflected both in his ultimate completion of the module, and that the scores that he received from the trainees in the program, as well as its continued use, verify its success. In other words, the attempt to pass the responsibility for the timeliness shortcomings of the new program onto the shoulders of Mr. Jones, must fail as a business justification for his layoff.

Remedy:

Mr. Jones testified that when he was laid off, he was off from work from July 5 to October 9, 2000, or three months, and that, when he was finally hired by his employer at the time of the hearing, Lan Associates, he still worked on the USEC Gaseous Diffusion Plant grounds doing subcontract work for the Weskem Company, a Department of Energy (DOE) contractor for Bechtel Jacobs. His annual USEC salary was $52,000.00, and $49,500.00 for Lan; while Lan has no pension fund, as did USEC. He received normal severance pay, rather than enhanced severance pay, and received the normal for Kentucky maximum unemployment compensation benefits.

In addition, he testified that he was, "hurt, disappointed, devestated, especially after seeing ... I had worked there for 12 years and for the first 11 I was a good employee, and then, all of a sudden, I was ... rated as just a really, really bad employee ... that will tend to depress you." (T 177)

CONCLUSIONS OF LAW

Applicable Law:

As discussed above, the present case has been brought under the employee protection provisions of the Energy Reorganization Act. Its "whistleblower" provisions are designed to protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of this Act. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993). The employee protection provisions of the Act have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *See, Devereux, supra, and Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998), final order approving settlement and dismissing complaint, 96-ARB-195 (ARB Sept. 25, 1996). For reasons more particularly set forth herein, I find Mr. Jones had either raised particular issues or begun proceedings, or was about to begin, proceedings under the Act, and will proceed accordingly.

The purposes and employee protections of The Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851, address "whistleblower" protection against harassment and retaliation by an "employer" for employees involved in the nuclear industry, who: (1) notify their employer of an alleged violation, (2) oppose a practice that would be a violation of the Atomic Energy Act of 1954, (AEC) or (3) testify before Congress or any Federal or State agency regarding a violation of the AEC.

It states that "[n]o employer" may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee engaged in the above activities, or has assisted or participated or is about to assist or participate in any manner in such proceedings as those listed, "or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954."

Under the ERA, once the complainant establishes a prima facie case, the employer must establish by clear and convincing evidence that it would have taken the same unfavorable action, i.e. taken its unfavorable action for a legitimate, nondiscriminatory business reason, as it would have taken, in the absence of the employee's protected activity, rather than merely "articulating" or stating the legitimate business reasons for the action. The employer may be directed to "abate" certain effects of the employer's unfavorable personnel action (which means that the discriminatee may be ordered reinstated with back pay) except compensatory damages, pending court review of the final decision of the Secretary of Labor.

The implementing regulations governing employee complaints, 29 C.F.R. Part 24, provide at 29 C.F.R. 24.1 that "No Employer" may discharge or otherwise discriminate against any employee who has:

> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statues listed in Section 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;

(2) Testified or is about to testify in any such *proceeding; or*

(3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute, ... (Emphasis added)

- or, under the ERA, has notified the employer of, or, on notice to the employer has refused to engage in, any action prohibited by the Atomic Energy Act of 1954, or has testified concerning any of the provisions of the Acts in any federal or state proceeding, as stated in the above 1992 amendments. 29 C.F.R. Section 24.2(a)-(c).

In addition, as also stated above, 29 C.F.R. 24.7(b) states that a determination of a violation of the ERA may only be made under the statutory provisions that the "protected behavior or conduct was a contributing factor in the unfavorable personnel action ...," and that the respondent has not demonstrated, "by clear and convincing evidence that it would have taken the same personnel action ..." as it would have taken without such protected behavior. The rule provides that, upon finding a violation of the ERA, the determination "shall" contain a recommended order "that the respondent take appropriate affirmative action to abate the violation, including reinstatement to his or her former position, if desired, together with the compensation (back pay) ...[etc.] ... and, when appropriate, compensatory damages," with the compensatory damages not effective until final decision by the Administrative Review Board. 29 C.F.R. 24.7(c)(1)&(2).

Standards for establishing violations of the ERA:

Related to the establishment of jurisdiction under the ERA, a complainant in a "whistleblower" case must first establish that the respondent is an "employer" under the provisions alleged to have been violated under the Act, and satisfy the initial burden of establishing a prima facie case of discrimination by showing the following:

(1) The "employer" is subject to the Act; 29 C.F.R. 24.2(a); ERA: 29 C.F.R. 24.5(b)(2)(ii)

(2) The complainant engaged in protected activity; 29 C.F.R. 24.2(b)(1)-(3): ERA: 29 C.F.R. 24.2(c)(1)-(3) and 29 C.F.R. 24.5(b)(2)(iii)

(3) The complainant was subjected to an adverse employment action; 29 C.F.R. 24.2 (a)&(b)

(4) The employer "knew" of the protected activity when it took the adverse action, ERA: 29 C.F.R. 24.5(b)(2)(ii), and

(5) An inference is raised that the protected activity was the likely reason for the adverse employment action. (*i.e.* ERA: the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. 24.5(b)(2)(iv)

See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-46, slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996).

In general, under established case law, once having established the employer/employee status, the employee must establish his prima facie case, and under the ERA, that it was a contributing factor to the unfavorable personnel action. The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Under the ERA, the respondent must produce clear and convincing evidence to establish a legitimate, nondiscriminatory reason for its action, while it may merely articulate the legitimate, nondiscriminatory reason under the other environmental statutes. Complainant, then must counter respondent's evidence by proving that the legitimate reason proffered by the respondent is false or a pretext for the prohibited discriminatory reason. See, *Yule v. Burns International Security Service*, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). This burden now includes the entire analysis of the burdens of production, proof and shifting obligations in a Title VII, Civil Rights action under 42 U.S.C. Section 2000e cases to the relevant environmental "whistleblower" cases, as established under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Burdine, supra,* through *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993).

From the outset, under *Yule*, the complainant maintains the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *See, St. Mary's Honor Center v. Hicks, supra; Darty v. Zack Company of Chicago*, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9) (citing *Texas Department of Community Affairs v. Burdine, supra.* Additionally, with specific relationship to the ERA, the Secretary stated in *Thompson v. TVA*, 89 ERA 14, (Sec'y July 19, 1993) that, under *Hicks* and *Burdine*, after the employer establishes its

legitimate non-discriminatory rebuttal, the first determination that must be made is whether the evidence shows that the discriminatory reason is more likely the motivation for the adverse reason. The rules clarify this obligation by adding in parenthesis, as set forth above, that the Complainant must prove that the protected activity was a "contributing factor in the unfavorable personnel action." Simply stated, the complainant continues to bear the burden of proving allegations of discrimination by a preponderance of the evidence.

This view is no different than what has recently been clearly restated by the United States Supreme Court in its review of *Hicks* in, *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, (2000), wherein the Court assumed (without deciding) application of the *McDonnell-Douglas/ Hicks* standards to court analysis of alleged violations under the Age Discrimination in Employment Act (ADEA). Indeed, the Court in *Hicks,* adopted its prior 1981 standard as set forth in *Burdine, supra,* that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," 450 U.S. 253, as now reinforced in *Reeves, supra.*

In the present case, weighing the impact of settled case law and the rules set forth at 29 C.F.R. Part 24, which codifies the above case law rules, Complainant has established that he was engaged in protected activity; that an adverse action has taken place against him (his layoff or IRIF) and that an inference has been established that his protected activity was a contributing factor to his layoff. USEC has articulated what is facially a "legitimate non-discriminatory" business reason for the unfavorable personnel, or adverse, action (layoff), in that it would have taken the same personnel action against Mr. Jones as it would have taken without his protected

behavior. It is my opinion, however, that it has not established that position by clear and convincing evidence.

While the "legitimacy" and "non-discriminatory" basis for the action is called into question by Mr. Jones' challenge to it, as either lacking credence or constituting a pretext for the action under the ERA burden shifting/ production standards, the result is the same: once the hearing has taken place, and the prima facie case presented with the business reason for the action established by the employer, the burden shifting analysis drops away, and Mr. Jones continues to have the burden of establishing whether the evidence shows that the discriminatory reason is more likely the motivation (the contributing factor) for the adverse action. In other words, he still must establish that his protected conduct remained a contributing factor in his unfavorable personnel or adverse action, and he was discriminated against in violation of the applicable statutes by a preponderance of the evidence.

For the reasons set forth herein, I find that Mr. Jones has met his burden of establishing a substantial, reasonable basis for his belief that his raising of safety considerations in his lack of training to be a trainer of operators of mobile industrial equipment (MIE) for powered industrial trucks (PITs) at USEC was subject to the "whistleblower" protections of the ERA; that his actions were a contributing factor to the adverse action (layoff), and that he has established a violation of the ERA by a preponderance of the evidence. As part of this, I find that the employer has not established by clear and convincing evidence that the layoff of Mr. Jones was for a legitimate business reason, or that it would have taken the same unfavorable personnel action in the absence of his behavior..

Since this case has been presented to the undersigned after a full hearing on the matter, the Complainant's ultimate burden of proof remains: to establish his allegations of violations of the Act by a preponderance of the evidence, as the paramount standard.[24] The following step-by-step analysis is presented for the sole purpose of order in understanding the various principles involved in evaluating the evidence in this case.

1. USEC's "Employer" Status:

Under 29 C.F.R. 24.2 (a) the complaining employee must establish that the alleged discriminating employer is an "employer" subject to the Act. For the ERA, 42 U.S.C. 5851, to be applicable, it must be determined if: (1) USEC is an employer, and (2) there is a sufficient nexus of the complainant's protected activity and respondent's adverse action to constitute a violation of the ERA. *McNeal v. Foley Co.*, 98-ERA-5 (ALJ Jul. 7, 1998).

Title 42 U.S.C. 5851(a) states that the term "employer' includes:

> A licensee of the Commission [NRC] ... under ... the Atomic Energy Act of 1954 (42 U.S.C. 2021);
>
> (B) an applicant for a license from the Commission or such an agreement State;

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[24] See, ALJ's comment in *Niedxielski v. Baltimore Electric, Co.*, 2000-ERA-4 (July 13, 2000), to the effect that, "working through the prima facie case is useful since the ultimate burden of proof still involves many of the elements covered in the prima facie analysis...."

(C) a contractor or subcontractor of such a licensee or applicant . . . .

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 710 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)) .." but not contractors under E.O. 12344.

By the 1992 amendments to the ERA, Congress clarified the coverage of existing "whistleblower" protection provisions to include as "employers," those employers of employees involved in any activity under the ERA or AEC, and established a separate paragraph to include the Nuclear Regulatory Commission, and (NRC)licensees, contractors, subcontractors of licensees, or applicants therefore. (H,R. No. 101-474(VIII), reprinted in 1992 U.S. Code Cong. & Admin. News 1953, 2296-2297).

Reflecting the legislative history is Appendix A to Part 24 (FR #98-2922, filed Feb. 6, 1998). It reinforces that history by stating:

The ERA makes it illegal for *an employer covered by the act* - including a licensee of the NRC . . . , an applicant for a licensee, a contractor or subcontractor of a licensee or applicant . . . - to discharge or otherwise discriminate against an employee in terms of compensation, conditions or privileges of employment because the employee or any person acting at an employee's request performs a protected activity. (Emphasis added.)

Using all three documents, 42 U.S.C. 5851, the legislative history to HR #102-474 and Appendix A of Part 24, it may be

concluded that Congress meant to cover the actions of all employers and employees who would be involved in any phase of any "proceeding" involving the training of employees who deal with the in plant transportation of nuclear materials covered by the ERA and Atomic Energy Act of 1954. I find that this includes reasonably based training and safety recommendations for the training of employees by the trainers of such employees such as Mr. Jones, regardless of whether it ultimately resulted in the transportation of nuclear materials covered by the NRC and the Atomic Energy Act of 1954 or not, since the continuing objective in this training would have involved the safety and health of the employees who do transport and move those materials.

An additional consideration is that, if the ERA "whistleblower" provisions provide protection only to those employees of commission licensees, applicants, contractors or subcontractors who pursue quality and safety investigations and complaints, but denies Mr. Jones, a trainer of those employees, that same protection, it would be contrary to the intent of Congress in bringing safety and quality problems to light and resolving them before accidents or injuries occur. *Hill v. TVA*, 87-ERA-23 (Sec'y May 24, 1989) at 6.

The second prong permits ERA jurisdiction if there is some "nexus between the activity for which protection is claimed and a goal, objective or purpose of the Atomic Energy Act of the chapter of which Section 5851 is a part." *McNeal v. The Foley Co.*, 98-ERA-5 (ALJ Jul.7, 1998) at 10. *See, Van Beck v. Daniel Construction Co.*, 86-ERA-26 (Sec'y Aug. 3, 1993) at 3 ("in order for jurisdiction to attach under 5851, a nexus must be established between the alleged protected activity and the objective or purpose of the ERA"), final order approving settlement (Sec'y, Feb. 10, 1994). As stated above, training employees to transport or move covered

materials under the Atomic Energy Act of 1954, is covered, whether he actually moves them or not, or whether his safety and health recommendations regarding such materials are adopted or not.

Generally, there is a nexus if "the complainant's concern implicates a nuclear safety hazard or the complainant . . . reasonably believe[s] there is a nuclear-related safety hazard." *McNeal v. The Foley Co*, 98-ERA-5 (ALJ Jul. 7, 1998) at 11. The Sixth Circuit has proclaimed that the ERA statute is designed to "protect workers who report safety concerns and to encourage nuclear safety generally." *American Nuclear Resources v. U.S. Dept of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). "[C]ourts have held that the ERA protects many types of acts that implicate safety. For example, the ERA protects an employee who files internal reports concerning regulatory violations." *Id.* @ 1295, citing, *Jones v. TVA*, 948 F.2d 258, 264 (6th Cir. 1991).

I find that Mr. Jones' health and safety complaints and recommendations regarding training and the failure to have properly trained trainers of mobile equipment that moves or transports UF6 and/or other related products have invoked both OSHA and NRC regulatory considerations. In so doing, they have necessarily implicated the broad public health and safety considerations meant to be included within the scope of the ERA, and the broad remedial purposes of the ERA. USEC is an "employer" under the ERA, and that there is a sufficient nexus of his conduct to the purposes of the ERA to extend coverage to Mr. Jones' activities thereunder.

2. Complainant's Protected activity:

a. General Rules:

The environmental statutes all protect an individual's participation in activity which furthers the respective statutory objectives. *See, Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993), *supra, and Jenkins v. U.S. Environmental Protection Agency,* 92-CAA-6 (Sec'y, May 18, 1994). In other words, the Acts protect the reporting of environmental or safety violations. *See, Johnson v. Old Dominion Security,* 86-CAA-3,4-5 (Sec'y May 29, 1991). Protected activity is broadly construed under the environmental whistleblower protection acts. *See also, Guttman v. Passaic Valley Sewerage Commission,* 85-WPC-2 (Sec'y March 13, 1992). Concerns that "touch on" the environment can be considered as "protected activity." *See, Dodd v. Polysar Latex,* 88-SWD-4 (Sec'y 22, 1994).

Internal complaints are also considered, pursuant to the environmental acts, as "protected activity." In *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996) the Board held that "[i]nternal safety complaints are covered under the environmental whistleblower statues in the Eighth Circuit, the Fifth Circuit and every other circuit. See, Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. NO. 102-486, 106 Stat. 2776," and Dodd, *supra* (CERCLA & SWDA); *Reynolds v. Northeast Nuclear Energy Co.*, 94-ERA-47 (ARB Mar. 31, 1997) (ERA); *Passaic Valley Sewerage Commissioner's v. United States Department of Labor,* 992 F.2d 474 (3d Cir. 1993) (CWA); *Wagoner v. Technical Products, Inc.*, 87-TSC-4 (Sec'y Nov. 20, 1990) (TSCA); *Guttman v. Passaic Valley Sewerage Commissioners,* 85-WPC-2 (Sec'y Mar. 13, 1992). The Board further noted in

Hermanson that the only exception to this rule at that time prior to the 1988 amendments, had been "for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. Section 5851 (1988), prior to October 24, 1992." *Brown & Root, Inc. v. Donovan,* 747 F.2d 1029 (5th Cir. 1984)

In addition, an informal complaint, such as verbal communication, constitutes "protected activity." *See, Nichols v. Bechtel Construction, Inc.,* 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), aff'd in *Bechtel Construction, Inc. v. Secretary of Labor, 50 F. 3d 926, 931* (11th Cir. 1995) stating that "general inquiries regarding safety do not constitute protected activity," but a pattern of inquiries regarding how to handle contaminated material can add up to protected activities." See, also, *Dysert v. Westinghouse Electric Corp.,* 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected); *Crosier v. Portland General Electric Co.,* 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity). The environmental "regulations make it clear that a formal proceeding is not required in order to invoke protection of the Act." *Kansas Gas & Electric Company, v. Brock ,* 780 F.2d 1505, 1512 (10th Cir. 1985), *cert. denied,* 478 U.S. 1011, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

To constitute protected activity, however, the substance of the complaint must be "grounded in conditions reasonably perceived to be violations of the environmental acts." *Minard v. Nerco Delamar* Co., 92-SWD-1 @ 5 (Sec'y Jan. 25, 1994). It is insufficient to show that the environment may be negatively impacted by the employer's conduct. *Decresci v. Lukens Steel Co.,* 87-ERA-13 (Sec'y Dec. 16, 1993) (the

environmental whistleblower provisions are intended to apply to environmental and not other types of concerns.)

b. Specific Protected Activies:

Mr. Jones' specific protected activities in the present matter consisted of, but were not limited to, the following actions: Repeatedly addressing the OSHA and NRC regulation violations implicit in not having properly trained and licensed trainers on MIE/PIT equipment; in not being properly trained and licensed himself; in never having anyone fail the prior program; in the filing of eleven ATRs and employee concerns involving the various violations, as otherwise more specifically set forth herein.

3. Adverse Action:

An "adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman,* 1997 115 F.3d 1573 (11th Cir. 1997). "Adverse action" encompasses any discrimination with respect to an employee's compensation, terms, conditions or privileges of employment. *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983).

I find that, in addition to the individual adverse actions discussed above in response to individual acts of protected conduct and activity, the present layoff or IRIF constituted a specific adverse action, much more than something unpleasant in Mr. Jones' case which warrants a specific remedy or remedies. It resulted in not only loss of income or benefits, but loss of reputation and prestige, as well as a lower paying job.

In addition to the above specific findings of adverse actions set forth in the discussion of protected activity, I would add the following as a type of conduct that is recounted throughout the findings of fact which constituted discriminatory adverse conduct and/or evidence of discriminatory conduct, as the background for the specific violations as alleged:

1. The unjustified, low, "1" and "2" ratings of Mr. Jones' "Competencies" for the IRIF Candidate Selection Summary, concerning, but not limited to, his "Integrity and trust," his "Creativity" and his "Knowledge of rules and regulations", all of which had previously been high ratings on his scheduled evaluations, just three months before the IRIF evaluation, and which could affect his entire career.

2. The active "shunning" of Mr. Jones by Mr. Bucy following Mr. Jones' questioning him on the requirements of the regulations, which I find to have taken place.

3. The insertion of Mr. Craven into the trainer position and permitting him to pass as the originator of training modules that were, in fact, the work of Mr. Jones.

4. Knowledge of Protected Activity:

Respondent's knowledge of a protected activity at the time of its adverse action is an essential element of the complainant's prima facie case. *See, Morris v. The American Inspection Co.,* 92-ERA-5 (Sec'y Dec. 15, 1992), slip op. At 6-7. Complainant has easily sustained this burden. It was the ATRs, reports and e-mails from Mr. Jones to Messrs. Fowler, Bucy, Starkey and Wetherell concerning the safety and health of employees being trained by someone without adequate training, and not in conformance with OSHA

regulations, that led to the delays in designing and implementing the training modules, his low ratings by management for them and his resultant IRIF, as otherwise more specifically set forth herein.

5. Motivation and Timing:

A complainant must produce sufficient evidence to raise an inference that the motivation for the adverse action was his protected activity. Temporal proximity between the whistleblowing activities and the adverse actions is sufficient to establish a prima facie case. *Tyndall v. U.S. Environmental Protection Agency,* 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), final order approving settlement and dismissing complaint, 96-ARB-195 (ARB Sept. 25, 1996), citing *County v. Dole,* 886 F.2d 147 (8th Cir. 1989); *Bartlik v. United States Department of Labor,* 73 F.3d 100 (6th Cir. 1996). However, in *Hadley v. Quality Equipment Co.,* 91-TSC-5 (Sec'y Oct. 6, 1992), the Secretary indicated that although a sequence of events occurring in a short period of time may invoke an inference of causation, it is still necessary to examine the events as a whole in determining whether the ultimate question of whether a complainant has proved by a preponderance of the evidence that the retaliation was a motivating factor in the adverse action. In other words, an administrative law judge may decline to find retaliation, notwithstanding the short proximity of events, if other facts show that complainant would have been fired had he not engaged in the protected activity. *Hadley, supra,* (employee engaged in a stream of obscene behavior immediately prior to adverse actions by employer) ; *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 (Sec'y Mar. 4, 1996) (complainant was fired for being out of his work area rather than his protected activity even though there was

temporal proximity between the protected activity and discharge).

In the present case, motivation may be inferred from the timely sequence of events related to the raising of OSHA and NRC regulatory health and safety issues that were delaying the implementation of the MIE/PIT training program; the failure to properly address Mr. Jones' plea for OSHA compliant training; the shunning of Jones by Mr. Bucy; the transfer of MIE/PIT training duties to Mr. Craven so that there could be a comparative analysis to lay someone off, when the conditions would have militated against the layoff of the trainer in that area, namely, Jones, and the deliberate manipulation of the lay off ratings to accomplish that end.

The timing of the IRIF in relation to the initiation of the layoff review process to other matters has been considered and discussed in reaching my conclusions. The layoff occurred on July 3, 2001. The IRIF review process began in May 2000. Mr. Craven was transferred in to Mr. Jones' department shortly before the IRIF review process began, with its undisclosed rating of 67 competencies, just 3 months after the mid-year evaluations. As indicated above, the rating process, which actually began with the one unsatisfactorily explained "B" on the mid-year evaluation, tracked several of Mr. Jones complaints about the overall situation arising from his lack of experience and training, his raising of OSHA and NRC issues on these matters, and his filing of ATRs and employee concerns about them.

6. The "legitimate and non-discriminatory" business reasons:

The respondent has the burden of producing evidence to rebut the presumption of disparate treatment established by complainant's prima facie case, by presenting evidence that

the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons for the adverse action. *See, Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. 248 (1981) (Title VII case). This must be established by clear and convincing evidence under the ERA. The complainant, however, retains the ultimate burden of proof. He must establish by a preponderance of the evidence that respondent's adverse actions constituted discrimination for his protected activity. Here, I have concluded that it was Mr. Jones' protected activity that was the motivating factor in Respondent's decision to lay him off, or to IRIF him, and the other actions of rating him so low in certain unwarranted, designated areas of performance and in shunning him. *Dysert v. Westinghouse Electric Corp., supra* and *Texas Dept. of Community Affairs, supra.*

In a nutshell, respondent presents the following as its justification for the "adverse action," in the decision to layoff Mr. Jones: The layoff was part of a large reduction in force; was not performance based; was because his quality of work was "mixed" in the training department; was not because he was an effective trainer, which he was, but he had problems revising training modules, refusing to accept responsibility for shortcomings and blaming management, and his own lack of experience and training; was not due to protected activity because he did not object to any protected activity; was a result of management concern that Jones was slow and ineffective in correcting problems that he discovered. Respondent contends that Jones has presented no evidence that his layoff was motivated by an improper intent of management. For this, respondent relies upon the steps of the evaluation and rating of "Competencies" in the layoff process, and the relatively "objective" conclusion that was reached in comparing trainer Craven with trainer Jones to reach the final decision to lay Jones off.

Recognizing that Mr. Jones was part of a general layoff, I reject Respondent's position that it was not on a performance basis, and find that despite protestations that the layoff was not "for cause," the record is replete with Respondent's attempts to provide evidence of Mr. Jones' lack of performance as justification for the layoff, as if it was a discharge for cause. Secondly, if the basis for the IRIF of Mr. Jones fails as a legitimate business reason for his layoff, the more stringent standards proof for a just cause discharge also fail for the same reasons that those reasons fail. If the layoff reasons are not justified, and no other reasons are posited by the Respondent to justify a discharge, then there was no just cause discharge and a severe "adverse action" has been established.

On this, I have made the following findings of fact:

I find that Respondent did not establish by clear and convincing evidence that it had a legitimate, nondiscriminatory reason for Mr. Jones layoff or IRIF, or for the low ratings given him on his Competencies for IRIF, and for shunning him, within the meaning of the ERA. While I find that business reasons were articulated in which it contended they were legitimate and nondiscriminatory, respondent did not establish that Mr. Jones was wrong in his assessment and attribution of blame to management in the timely formation of an OSHA compliant MIE/PIT training program and module, in which his own inexperience and lack of training did play a pivotal role that was correctly assessed by him, despite any shortcomings of his own; that he did object to protected health and safety concerns related to that condition; that he has presented substantial, credible, circumstantial evidence that his layoff was motivated by an improper management intent, and that he would not have been laid off anyway. Respondent has failed to establish by clear

and convincing evidence that the reasons for the layoff were either legitimate or nondiscriminatory, so the analysis could end right there. However, to the extent that they might have been so considered I find that those assertions were incredible and also constituted a pretext for the real discriminatory reasons, a termination for his protected activity, as set forth below.

7. Layoff reasons as a pretext:

Once the respondent articulates a legitimate, nondiscriminatory basis for its action, or establishes it under the ERA, the focus shifts to the issue of whether such basis is merely pretextual and that the respondent's action was based on a discriminatory motive. The complainant,

> may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. . . In order to determine that [the complainant] has established discriminatory intent in regard to this adverse action by the [respondent], however, "[i]t is not enough . . . to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination."

St. Mary's Honor Center, supra, 113 S.Ct. at 2749, 2754, 125 L.Ed. 2d at 424.

The main USEC management figures behind the alleged "adverse action" tell different and conflicting stories. The primary people who supervised Mr. Jones and were involved with the decision to IRIF him, were: Ron Fowler, Dannie Bucy, Russ Starkey and Ron Wetherell. Fowler's recount of

the lack of training and knowledge of the MIE/PIT area, as well as that of Bucy, at least at the outset of his new transfer duties are substantially different from that of Starkey. So too was the failure of Starkey to assume the blame for those delays, due to that condition, even when raised by Jones to his own detriment. Wetherell's supervisory deficit was in failing to adequately investigate the condition and relying upon an incomplete HR investigation and report on Jones' employee concerns memo. He should have recognized from the outset that he was dealing with a very essential management problem in the structure and operation of the training department where the MIE/PITs were concerned - and a very dangerous one.

It is my belief that the internal "motor pool"[25] mentality regarding this aspect of the Plant's operations were given a secondary status to those operational functions involving the processing of the UF6. Just the fact that the SAT procedures applied to that production but not to the MIE/PITs has been enough to convince me of this institutional dichotomy, even though the MIE/PITs deal directly with the handling and movement of the product, which may be just as dangerous. More specifically, I also find that the existence of materials or other information for either SAT or non-SAT based procedures, did not constitute training that would have qualified as a "train the trainer" course for Mr. Jones. In addition, I find that the fact that there were materials and/or procedures available concerning the SAT course that was under revision until March 2000, and/or other non-SAT

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[25] This is a military term relating to the place where it's ground transportation and work vehicles are stored and maintained. It is differentiated from the location of the military equipment used in it's "operations" or the military mission of the base, i.e., aircraft, helicopter, ships, etc.

procedures available, did not constitute a training course for Mr. Jones; that this condition contributed to the delays encountered by him in creating the necessary MIE/PIT training modules, and that this condition was one created by USEC management over which Mr. Jones called to their attention, but had no control. In other words, management had complete control over this element of the delay; thus legitimizing the statements of Mr. Jones to USEC officials that his lack of training encompassed safety matters in the training of employees who would be operating the PITs, and it constituted protected activity contributing to the conditions relied upon in selecting him for layoff.

As Mr. Jones correctly concluded, this factor alone would justify the immediate formation a TRG with its expert advise for creating a training module. However, these global policy matters were out of the hands of Mr. Jones, and squarely on the shoulders of management. The failure of supervision to recognize this, and to then place the blame for program shortcomings on Jones, is the reason why we are here, and why management must be saddled with the effect of its conduct, which constitutes a violation of the Act.

Ultimately it was the use of the TRG, following the SAT procedures in the non-SAT procedure setting for the MIE/PIT training, as originally advocated by Mr. Jones, and rejected by Diane Snow, that served as the basis for resolving the problem of forming the training modules for that program, including the one attributed to Mr. Craven, but created by Jones. In fact, Mr. Fowler agreed with the TRG approach of Jones, but told him to identify the issues in an ATR. (RX 1) Jones filed one, stating that until there was an agreed upon direction of all parties involved that it would be difficult if not impossible to fix the situation. To his credit, Fowler then stated that he agreed with Jones; that the sooner the better for

the TRG; that he was worried about whether Jones was properly trained on meeting the criteria for successful instruction on it; that he appreciated the aggressive nature of Jones demonstrating, finding and identifying those issues, and that guidance toward a cure was what Jones needed. He then complimented Jones, stating, "Good work." (RX 1; T 258 - 259) This provides support for the position of Jones in comparing his prior evaluation to the improvident use of the "Competencies" in forcing his layoff.

As stated in the conclusions of fact, Mr. Starkey's testimony regarding his unhappiness with Jones ultimately begged the question of the extent to which his lack of training and experience involved severe safety matters that were being legitimately raised by Jones, and not resolved by either Fowler, Bucy or even Starkey himself, which I find substantially contributed to the real cause of the lack of success of the program. Starkey's allocation of blame turns the managerial obligation on its head, when both the selection of Jones and the failure to get him safely and adequately trained lay squarely on the shoulders of management.

On its face, Mr. Starkey's explanation of the use of the layoff criteria to justify Mr. Jones' layoff, appears to present a legitimate business explanation for the action. However, under scrutiny, the attempt fails. It is based upon a false premise: that, since the criteria utilized to rate the candidates appear to be objective criteria, those criteria are, therefore, objective as a matter of fact! In the application of the process, here is what happens: calling the procedure "as objective as possible," managers who know the candidates, meet, confer and form a subjective "consensus" about selected criteria in the 67 Competencies, and apply them to individual IRIF candidates, actually forming a joint subjective conclusion. Thus, in branding the process "as objective as possible," the

joint subjective results becomes objective. The action against Mr. Jones proves the case. An employee whose integrity and trust had never been in question as of three months earlier, is now not only in question, but used as a linchpin in his termination, without cause. Link that with a few other evaluation redefinitions, and he is beyond recall - both figuratively and literally.

I find that the rating of Mr. Jones, of "1" in "Integrity and trust," to have been totally at odds with his prior evaluations, in particular that of his mid-year evaluation three months earlier by Supervisor Fowler stating in handwriting that his "integrity and trust were never in question." Wondering what had prompted management to give him such a new low rating, not only in this category, but in others, I found management witness explanations (i.e., that he failed to recognize and disclose certain shortcomings as a matter of integrity and trust,) not only did not meet my expectations on it, they did not fit within any concept of integrity and trust rating with which I was familiar over thirty five years of labor and employment law experience. When considered as a personal characteristic, Webster's II Dictionary defines "integrity" as: "Firm adherence to a code or standard of values: Probity." It defines "trust" primarily as: "Total confidence in the integrity, ability and good character of another." Mr. Fowler obviously made his handwritten observation on this kind of a combined definition of "integrity and trust." Management witnesses failed to adequately explain the departure, and why the definition used to rate the same person for layoff should be different. I reject that notion, and give the new interpretation no credence.

As indicated above, I find that the application of the "Competencies" criteria here, to Jones, was far from objective. It was indeed subjective, with the overriding factor

being the thoroughly subjective disregard of the evidence of OSHA safety violations that Mr. Jones had pursued through his having obtained a thorough knowledge of the rules and regulations governing the safety and health factors that would regulate the MIE/PIT training program. On this, there is a total absence of Respondent evidence that Jones was wrong in his interpretation and application of the rules, save one where it turned out that the rule had been withdrawn. He recognized those factors and had the integrity and trust to bring them to their attention.

So too was management's assessment of Mr. Jones' "knowledge of rules and regulations" and his "creativity." These were not, in my opinion, objective or accurate ratings, and also contradicted prior ratings, without notice of any change. His knowledge of rules and regulations was, indeed, his "strong point," and his creativity" was demonstrated well above the "2" that he was given. It was precisely because he was raising very legitimate, specific, OSHA regulation safety matters, that delays in accomplishing the training modules occurred, and I so stated in the hearing. Management witnesses did not change my mind on the matter.

Despite management attempts to contradict the "creativity" rating, management did not contradict the facts testified to by Mr. Jones in the creation of the training module(s) that continues to be used at USEC. I find that this was certainly "creative" within the meaning of the Competencies, and facially should have been rated a higher level than a two, especially when measured against his prior evaluations.

With regard to Mr. Craven's place in the process, whatever his ratings were based upon, they could not have been based upon any of his own work with the MIE/PIT

program that was virtually the entire rating basis for that of Jones. It was defective reasoning from the outset, comparing "apples to oranges"and verifying the failure of the entire system! It emphasizes the contrast between the scheduled evaluation procedure and the layoff evaluation procedure, with the former requiring employee participation at both the initial and the final rating levels, and the latter devoid of such participation.

No one denies the past training credentials of Craven, but Mr. Starkey's response on the matter simply proves too much. The question arises, why did he transfer him to the MIE training position just before the layoff evaluations, and not do it sooner? Claimant's argument, that if they had not done so, there still would have been a severe need there for a trainer, and that Jones would likely not have been laid off, has merit. The managerial action is not logically explained, and it certainly does not provide a rational business explanation for what they failed to do with Jones before that, when they otherwise admit that he was a good trainer.

Returning to the transfer and his initial evaluation, Mr. Jones did the only responsible thing that he could do at that time: When he realized after his transfer to the training department that his credentials were insufficient for the MIE/PIT program, he fully and courageously, informed management of his predicament and its safety implications. He requested training before being required to complete the training modules, and clearly raised the safety implications of not doing so. Yet, all management could do was to say, "Fix it." I now agree with Mr. Jones that the "Fix it." answer of Mr. Starkey was an inappropriate answer since, as the supervisor of Jones, it was definitely his responsibility to "fix" the problem being presented by Jones, and that he and he alone had the responsibility to see to it that Jones received

the proper training before Jones had the full responsibility for completing the MIE training modules. This was neither Mr. Fowler's nor Mr. Bucy's responsibility, it was that of Mr. Starkey.

In so doing, without resolving Mr. Jones request to solve the training of the trainer requirement beforehand, USEC management (not Mr. Jones) actually (not potentially) endangered the entire plant with everybody in it (not merely those who had anything to do with mobile industrial equipment), and threatened the well being of the surrounding citizenry, for as long as they operated with insufficient training. While no evidence was offered on the effects of a dropped, fractured, gas cylinder from one of its haulers, those effects could have been disastrous. I take judicial notice of the fact that four accidents between the years of 1997 and 2000 were involved with the transportation of such UF6 cylinders, two of which were related to the Portsmouth, Ohio facility, and have resulted in an NRC proposed revision of the rules governing the transportation of UF6.[26]

There was no way that Jones could have completed an already long-term, inadequate MIE/PIT training program in a safe and timely manner, any sooner than he did. The fact that he did complete a program, albeit later than expected, was primarily something that should have been considered to

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[26] See, NRC proposed revised UF6 Transportation Safety Standards, **(Compatibility With IAEA Transportation Safety Standards (TS-R-1) and Other Transportation Safety Amendments; Proposed Rule**, 10 CFR Part 71, comment period closing **July 29, 2002**.) Federal Register: April 30, 2002 (Volume 67, Number 83), Page 21389-21484. The statistics involving accidents in the transportation of UF6 were derived from the comments on the proposed rule as above published

his credit. To, however, cast the blame for failures in the entire program to that point onto Jones through the layoff rating process, was a subterfuge for the role of management's own inadequacies. I emphasize, again: if there were two things that were never at issue regarding Mr. Jones, in my opinion, they were his knowledge of rules and regulations governing the process and his personal integrity and trust. Rating him so low on these two known strengths, when he, in fact, had risked his career by utilizing them to call management's attention to the shortcomings of the program, and then getting rid of him through the layoff process for so doing, is exactly what the whistleblower provisions of the ERA were meant to prevent.

It is my opinion that the business explanation offered by Respondent for the layoff of Mr. Jones was contradictory and defective. It lacked credibility for the above reasons, and, therefore, its legitimacy has not been established by clear and convincing evidence.

8. Respondent's "Mixed Motive" Defense:

"Pretext" and "mixed motive" theories regarding an employer's motive for responding to its adverse action against an employee that has established protected activity, are two different and distinct theories, which are sometimes argued as being contradictory. They are not, but they may be sequential. In examining motivation, there is seldom direct evidence such as a picture of a physical act or a tape recording of an admission that the adverse response was for the employee's protected activity. An admission, itself, is rare, but has happened. Normally, circumstantial evidence is required, such as the timing of the adverse action, shifting responses of the employer, or its pretextual nature, are examined to determine motivation. However, in proving the employer's motive by

such inferences, "mixed motive" considerations usually arise from the employer's business reasons for its actions, after the timing, shifting explanations and pretextual responses offered by the complainant have been considered, and it has been determined that motive has thereby been established, and a potential violation of the Act is deemed to have been established. Basically, the employer then argues that although there may have been a violation, the employee would have been discharged, disciplined, laid off or otherwise adversely affected, anyway.

This sequence has a long history arising out of National Labor Relations Board (NLRB) experience in developing evidence of discrimination and motivation as set forth in its *Wright Line* cases under the National Labor Relations Act, as amended. (NLRA). *Wright Line, Wright Line Div.,* 251 NLRB 1083 (1980) *enf'd* 662 F.2d 899 (6th Cir. 1981) *cert. denied* 455 U.S. 989 (1982). See discussion and citations at **The Developing Labor Law, 3d Ed.** Pp. 216 - 219, Bureau of National Affairs, Washington, D.C. (1992). In *Wright Line,* the NLRB adopted a two part "mixed motive" theory in which an employer may prevail if it is able to prove that the termination would have occurred even in presence of protected conduct, and also if between the time of the decision for the termination and the termination itself, a legitimate reason for discharging the employee occurs. (Ibid.) This was later adopted by Congress in the ERA when it stated under Title 42 U.S.C. Section 5903d(D), relief may not be ordered under the Act, "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." This will be addressed in the conclusion.

Whether right or wrong in the analysis by Mr. Wetherell, it is my opinion that his actions and those of Weber from HR

initially appeared to have presented a legitimate business explanation for USEC conduct in denying the objections of Mr. Jones to the "B" received on his mid-year evaluation, which, at that time was not fatal to his employment. However, they both chose to rely upon Fowler, Bucy and Starkey, who, collectively or individually, were doing an extremely poor management job, as is clearly asserted by them about Fowler, and accepted their explanations about Jones' progress on the training progrma in the MIE/PITs. This set up the scenario for the IRIF competency evaluations, including that of Jones.

The activity of the latter three in particular with regard to Mr. Starkey, whether planned, retaliatory or not, created a box around Jones over the mobile industrial equipment/powered industrial truck (MIE/PIT) training issue. At the outset, this was, at least in part, a result of the inability of Jones to work his own way out of the MIE/PIT box, due to his own lack of training and experience with that equipment. However, that was a fact, of which Starkey, Bucy and Fowler all had knowledge. Their failure to, (1) determine the MIE qualifications of Jones before placing him into the MIE training position; (2) train Jones before so doing, and (3) listen to him when he raised the safety considerations of his own limitations in that training position, helped to create the box, and justified the position that Jones took on it.

The question then becomes, what if any role, either in the overall condition of his inability to handle the MIE, or specifically, his raising of the safety issues, this situation played in his selection for layoff. If it was, indeed, the overall condition, which left management with an unqualified trainer in the position, his selection for layoff might be justified. If it was the fact that he raised the safety issues that called the competency of his immediate superiors into question, as well as his own, and that was the reason for the layoff, then the

motivation was in retaliation for his protected activity, and a violation of the Act.

If, however, pretext was established and there was a "mixed motive" for the layoff, consisting of both the unprotected incompetence motivation together with the protected activity in the raising of the safety issues, and the Respondent can establish by clear and convincing evidence that Jones would have been laid off anyway, then there is no violation of the Act. As stated above, relief may not be ordered under the Act, "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

I find, as a secondary matter, assuming that pretext has been established, and there would otherwise be a violation of the act because of that determination: (1) that this is a "mixed motive" case; (2) that one significant reason for the layoff of Mr. Jones was his inability to handle the mobile industrial equipment, powered industrial truck training modules, which was an essential part of the remaining trainer position duties; (3) that his raising of safety issues related to his lack of experience and training in the operation of MIE/PITs were taken as an adverse reflection on his immediate supervisors for which they wanted him to be laid off, at that time; (4) that Respondent's manipulation of the layoff rating system to create a lower score on what would have otherwise been higher ones that might not have resulted in a score lower than another employee's scores was a deliberate, intentional act of retaliation for his raising of safety and health issues; (5) that Respondent has not established by clear and convincing evidence that Jones would have been laid off, for his inability to handle the MIE training portion of the remaining training position, anyway, and (6) that Respondent's violation of the

Act was intentional, as demonstrated by the layoff rating manipulation.

Conclusion:

Here, I find that Mr. Jones was an employee of an employer covered by the provisions of the ERA; that he was a member of the class of employees protected by the "whistleblower" protective provisions of the ERA; that he was engaged in protected activity as the employee who managed to call attention to the safety implications of his proceeding in the training position without the trainer training necessary to create an MIE/PIT training module; that he was laid off in retaliation for the issues that he raised about these matters. In response to the business justification of Respondent USEC for the layoff and other actions taken against Mr. Jones by USEC, I find that the reasons were not established by clear and convincing evidence; that he would not have otherwise received the low rating and consequent layoff , and, therefore, his layoff; that the reasons stated constituted a pretext for the real reason that he was terminated, his protected activity, and that Respondent has, failed to "demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

As a consequence, Complainant has established, by a preponderance of the evidence that his layoff was directly and intentionally motivated, at least in part, by his health and safety complaints; that they legitimately involved the safety and health of USEC in handling and moving nuclear products, by-products, with mobile industrial equipment, including powered industrial trucks, cranes, forklifts, cylinder haulers, and the like and that this directly involved practices made unlawful by the Energy Reorganization Act, and that they

contributed to his termination by layoff, and other adverse actions more particularly set forth herein.

REMEDIES :

Having found that the complaint of Mr. Jones has merit in that USEC has violated the employee protective provisions of the ERA through his layoff, I must consider the remedies that must be ordered to rectify the violations, and make Mr. Jones whole for them. This "make whole" remedy must include appropriate reinstatement and back pay, benefits. Compensatory damages and orders to restore his reputation may also be considered as a recommended order. 29 C.F.R. 24.7(c)(1). Back pay and benefit considerations may include lost vacation and other chargeable pay remedies such as compensation time, sick time, and other time benefits, as well as lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked.

The purpose of reinstatement and a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in, if he had not been discriminated against. Back pay awards should, therefore, be based on all of the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). The Sixth Circuit has held that 5851 (b)(2)(B) of the ERA allows compensatory damages in addition to abatement of discrimination, reinstatement with back pay, and restoration of all job related entitlements such as retirement benefits. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), on remand at *Deford v. Tennessee Valley Authority*, 81-ERA1 (Sec'y Aug. 16, 1984). Medical expenses and damages for injury to reputation may also be awarded. *Ibid.*

Mr. Jones is also entitled to prejudgement interest on the back pay, and lost litigation time pay in accordance with prevailing case law. The fact that the ERA, or the other the environmental Acts, do not expressly provide for interest on back pay awards does not preclude it. Backpay awards are designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is also necessary to achieve this end. According to the Administrative Review Board in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000), "[t]he usual interest rate employed on back pay awards under ... whistleblower provisions is the interest rate for underpayment of federal taxes, set forth at 26 U.S.C. 6621(a)(2) (short-term Federal rate plus three percentage points)." The ARB has held that in whistleblower cases, it awards the same rate of interest on back pay awards, both pre- and post-judgment that is, compounded and posted quarterly. The Board in *Doyle* stated: "In light of the remedial nature of the ERA's employee protection provision and the 'make whole' goal of back pay, we hold that the prejudgment interest on back pay ordinarily shall be compound interest. Our reasoning applies equally to back pay awards under analogous employee protection provisions of the other federal statutes under which we issue administratively final decisions under the CAA, CERCLA, FWPCA, SDWA, SWDA, STAA and TSCA. [27] Absent any unusual circumstance, we will award

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[27] The Clean Air Act ["CAA"], 42 U.S.C. Section 7622 (a); the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"], 42 U.S.C. Section 9610; the Federal Water Pollution Prevention and Control Act ["FWPCA"], 33 U.S.C. Section 1367; the Safe Drinking Water Act, ["SDWA"], or Public Health Service Act ["PHSA"], 42 U.S.C. Section 300j-9; the Solid Waste Disposal Act ["SWDA"], 42 U.S.C. Section 6971;

compound interest on back pay in cases arising under all of these ... provisions." Under *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996), interest does not accrue on a compensatory damages award.

Prejudgment interest on back wages recovered in litigation before the DOL is calculated, in accordance with 29 C.F.R. 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. 6621. The employer is not to be relieved of interest on a back pay award because of time elapsed during adjudication of the complaint. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991); citing *Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990).

As part of the "make whole" remedy, respondent may also be ordered to post notices containing the following order, and to submit such notices as are ordered by the undersigned to affected third parties. In *McMahan v. California Water Quality Control Board, San Diego Region,* 90-WPC-1 (Sec'y July 16, 1993), the respondent was ordered to expunge from its records all memoranda or reference to a reprimand which had been found to be in violation of the FWPCA's whistleblower provision, to post written notice for 30 days advising its employees that the reprimand had been expunged and that he has been reinstated to his former position, and to pay complainant's costs and expenses. See also *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000) In

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the Surface Transportation Assistance Act, 49 U.S.C. Section 31105; and the Toxic Substances Control Act ["TSCA"], 15 U.S.C. Section 2622.

addition, ARB affirmed the ALJ's order requiring respondent to post the decision at its own facilities in *Doyle*.

In *Smith v. Esicorp, Inc.*, 1993-ERA-16 (ARB Aug. 27, 1998), respondent was ordered to post the ARB's decision for a period of 90 days, as well as an earlier Secretary of Labor remand decision. It was to be posted in a lunchroom and another prominent place accessible to employees at the nuclear facility where complainant was subjected to harassment. The ARB stated that "[t]he purpose of posting is to provide notice that whistleblowers will be protected if they are discriminated against. If [respondent] is unable to secure posting . . . at the . . . nuclear plant, notification may be accomplished by publishing the two documents in a local general circulation newspaper."

According to the Administrative Review Board, where a violation of the ERA is found, compensatory damages may be awarded in addition to back pay, for emotional pain and suffering, mental anguish, embarrassment, and humiliation. 42 U.S.C. 5851(b)(2)(B); 29 C.F.R. 24.6(b)(2). A complainant is not required to include an explanation of the damages sought in his whistleblower complaint. See, *Sawyers v. Baldwin Union Free School District,* 85-TSC-1 (Sec'y Oct. 5, 1988), slip op. at 3-4. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Aug. 16, 1993). The award may be supported by the circumstances and testimony about physical or mental consequences of retaliatory action, but the testimony of medical experts is not necessary;. *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993). The Sixth Circuit has enforced the concept of damages for injury to reputation. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), on remand at *Deford v. Tennessee Valley Authority*, 81-ERA1 (Sec'y Aug. 16, 1984), stating that medical expenses as well as damages for injury to

reputation may also be awarded. However, *DeFord* also stands for the proposition tha sufficient substantial evidence must be presented to justify the award. In the present case, there is some evidence to support compensatory damages, but the lack of supporting evidence, either by documentation or other testimony tends to limit the amount that may be awarded in this case.

In *McCuistion v. TVA*, 89-ERA-6 (Sec'y Nov. 13, 1991), the Secretary Of Labor cited favorably a series of decisions which upheld compensatory damages for the following types of harm: symptoms such as insomnia, nightmares, fatigue and appetite loss, an employee's wife suffering from tremendous emotional strain, other marital problems, deterioration in health, an exacerbation of pre-existing hypertension, and feelings of remorse that the education of the employee's daughter was disrupted. In *Mitchell v. APS/ANPP*, the Administrative Law Judge awarded $50,000, in part, because respondent's hostile work environment caused the complainant to become upset and nervous, and suffer from post- traumatic stress disorder. 91-ERA-9 (ALJ July 2, 1992.)

Here, I find three important factors present: (1) The totality of Mr. Jones training activities after his transfer to that department was such that the provisions of the ERA were invoked from the beginning of his assignment to the end of it, due to his continuous reminders' of the violations of OSHA rules and regulations that were involved in not providing the necessary training on MIE/PITs to construct training modules in that area; and, (2) USEC management had an intent to promote harm to Mr. Jones, in the deliberate use of the IRIF evaluation system to bring about his layoff in response to the health and safety matters that he had raised, and I have specifically rejected USEC management's explanations therefore. (3) As a third consideration, Mr. Jones has testified

to the various effects that the employer's unlawful conduct has wrought, which I credit in its entirety, as follows:

Mr. Jones testified that when he was laid off, he was off from work from July 5 to October 9, 2000, or three months, and that, when he was finally hired by his employer at the time of the hearing, Lan Associates, he still worked on the USEC Gaseous Diffusion Plant grounds doing subcontract work for the Weskem company, a Department of Energy (DOE) contractor for Bechtel Jacobs. His annual USEC salary was $52,000.00, and was $49,500.00 for Lan. Lan has no pension fund, as did USEC. In addition, Mr. Jones received normal severance pay, rather than enhanced severance pay. He received the normal for Kentucky maximum unemployment compensation benefits. In addition he testified that he was, "hurt, disappointed, devastated, especially after seeing ... I had worked there for 12 years and for the first 11 I was a good employee, and then, all of a sudden, I was ... rated as just a really, really bad employee ... that will tend to depress you."

In addition, it has been established that:

1. Mr. Jones has lost the honor, prestige and reputation of the training position that he had earned and held before the transfer, and is now entitled to reinstatement, back pay, lost pension contributions and benefits, and other lost pay, as well as a make whole remedy.

2. Mr. Jones was out of work for a total of three months, for which he is entitled to back pay in the amount of $13,000.00, plus the difference between he regular pay at USEC of $52,000.00, minus that of base pay at Lan, in the amount of $49,500.00, or

$2,500.00 per year, or $208.332 per month, through the date of the this recommended decision and order, which is $5,000.00 on or about July 6, 2002, and continuing thereafter on a monthly basis, as more accurately calculated in accordance with actual USEC payroll records, plus interest and lost benefits related thereto, if any, minus severance pay and unemployment compensation benefits, unless otherwise provided by state law, through the date of the final order in this matter.

3. It may also be inferred from his presence at the hearing and his testimony that Mr. Jones has lost at least 2 days plus time devoted to the taking of depositions and preparation for this hearing, and of either vacation pay benefits, leave without pay, compensatory time or other pay for lost time in preparation for the hearing, for which I find that he is entitled to an award of damages, and do so order at the rate at USEC.

4. At the election of Mr. Jones, that USEC pay the lost pension fund contributions and benefits to him in the following manner, either: (1) payment of direct contribution to the pension fund for his time lost at USEC due to his termination at the rates in effect throughout the period from the date of his layoff to the date of this final order; or (2) payments of direct compensation in lieu of those payments as follows: (a) the amount of the periodic contribution as set forth above, plus (b) a prorated calculation of the earnings of the pension fund times the amount that would have been contributed on his behalf to his USEC pension fund, to be paid directly to him for the purpose of investing in the his own retirement fund, if any, or to

be utilized at his own discretion, if he has no other such account.

5. Although Mr. Jones did not specifically request compensatory damages, it is my opinion that it may be inferred from this testimony that he was, "hurt, disappointed, devastated, especially after seeing ... I had worked there for 12 years and for the first 11 I was a good employee, and then, all of a sudden, I was ... rated as just a really, really bad employee ... that will tend to depress you", and I so find. I have observed his forthrightness, his consistency, and demeanor throughout the trial, and I credit his testimony on these points, and therefore conclude that this condition has added to stress and depression over and above the loss of pay and benefits, and is, therefore, entitled to compensatory damages under the ERA, for the mental consequences of USEC's retaliatory action, including emotional pain and suffering, mental anguish, embarrassment, and humiliation, which I credit. Since his departure from all work was brief and did have some lasting effects, but he did not offer other supporting or descriptive evidence, either from medical, psychiatric or lay sources, and noting that medical evidence is not absolutely necessary to award compensatory damages, I find that he is entitled to an award of compensatory damages in an amount of not less than $10,000.00.

6. I also direct the USEC to notify all other agencies of the the United States Government and subcontractors for those agencies with whom the USEC has been involved at the Paducah Gaseous Diffusion Plant, and with whom Mr. Jones had business dealings on behalf of USEC, or to whom Mr.

Jones submitted applications for employment, by submitting a letter enclosing the attached notice to the departments of such agencies or subcontractors with whom USEC has done business through Mr. Jones.

7. Since Mr. Jones is entitled to his attorneys' fees and costs of litigation, I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order. Requests for attorney travel and expenses must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

8. In addition to the above, upon finding a violation of the ERA, 29 C.F.R. 24.7(c)(2) requires that, in the event that I find that the complaint has merit and contains the relief prescribed in 29 C.F.R. 24.7(c)(1), then I must issue a preliminary order providing all of the relief set forth in that paragraph, with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary of Labor, and shall be effective immediately whether or not a petition for review is filed with the Administrative Review Board. The compensatory damage award shall not be effective until the final decision is issued by the Administrative Review Board. The ERA does not permit exemplary damages. Under this preliminary order, the implementation of the "make whole" remedies are mandated. These include the reinstatement of Mr. Jones to his former position as trainer, in particular as trainer for the

mechanical industrial equipment and powered industrial trucks (MIE/PITs) for the Paducah Plant together with payment of his lost back pay, and benefits, including pension contributions as set forth above, effective immediately upon issuance of this preliminary order. It also includes posting of the order, and the communication of it together with the cover letter set forth above to all U.S. Government agencies and subcontractors with whom Mr. Jones was involved on at the Plant or in his search for employment.

9. I direct that Respondent, USEC post a the attached notice on all of its employee bulletin boards, or in all of its public places and points of ingress and egress of its employees at its Paducah Gaseous Diffusion Plant for a period of not less than 90 days from the date of posting.

Therefore, the following recommended order, to be effective immediately if no petition for review is filed, or upon an applicable ruling by the Administrative Review Board if review is sought under the provisions of 29 C.F.R. 24.1(c)(1), and the additional preliminary order, to be effective immediately whether or not a petition for review is filed with the Board under the provisions of 29 C.F.R. 24.1(c)(2), are hereby issued:

RECOMMENDED ORDER

Having found that Mr. Jones' complaint has merit in that USEC has violated the employee protective provisions of the the Energy Reorganization Act, 42 U.S.C. Section 5851, and the implementing regulations appearing at 29 C.F.R. Part 24.1, and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Jones whole and to compensate him for them within the provisions of the seven Acts, therefore,

IT IS ORDERED that,

1. Respondent USEC cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Douglas Jones for his protected activity under the ERA;

2. Mr. Jones be immediately reinstated to his former position as site coordinator at USEC's Paducah Gaseous Diffusion Plant;

3. Mr. Jones receive full back pay for all time lost due to his layoff, plus benefits and pension contributions, to include, $13,000.00 in back pay for the three months that he was totally unemployed due to the layoff, plus $5,000.00 difference in pay for 24 month a from the time of his layoff in July 2000 through June 2002, plus monthly payments thereafter at the rate of $208.33 per month as otherwise ordinarily calculated and paid by USEC until it has complied with all of the provisions of this decision and order plus pension fund benefits and other benefits, if any;

4. At the election of Mr. Jones, that USEC pay the lost pension fund contributions and benefits in the following manner, either: (1) payment of direct contribution to the pension fund for his time lost at USEC due to his termination at the rates in effect throughout the period from the date of his layoff to the date of this final order; or (2) payments of direct compensation in lieu of those payments as follows: (a) the amount of the periodic contribution as set forth above, plus (b) a prorated calculation of the earnings of the pension fund times the amount that would have been contributed on his behalf to his USEC pension fund, to be paid directly to him for the purpose of investing in the his own retirement fund, if any, or to be utilized at his own discretion, if he has no other such account.

5. Mr. Jones receive 2 days lost pay, plus any other time lost, due to the various phases of the litigation, including pay for lost time due to such matters as attending depositions and preparation for this hearing;

6. Mr. Jones be paid the amount of $10,000.00 in compensatory damages.

7. Where applicable, that Mr. Jones receive interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

8. Mr. Jones' personnel file be expunged of all adverse personnel actions and comments regarding allegations against him made as a result of his transfer to the training department in 1999 and his layoff therefrom in July of 2000;

9. Respondent, USEC, post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Paducah Gaseous Diffusion Plant, for a minimum of 90 days;

10. A letter be addressed to the appropriate offices of USEC and all other governmental agencies and subcontractors Mr. Jones has been cleared of all allegations against him made as a result of his transfer to the training department in 1999, and his layoff from USEC in July of 2000, and that the letter include a copy of this order and preliminary order;

11. Mr. Jones is awarded his attorneys fees and costs of litigation, concerning which I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order. Requests for attorney travel and expenses must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

All other outstanding motions which have not been directly addressed in this recommended decision and order, are denied.

IT IS SO ORDERED.

A
THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE

The Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. See 29 C.F.R. 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

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JUN 14 2006
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SUPREME COURT, U.S.

(2)

No. 05-1304

In the Supreme Court of the United States

DOUGLAS JONES, PETITIONER

v.

DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Section 211(b)(3)(C) of the Energy Reorganization Act of 1974, the Department of Labor may find discrimination only if the complainant has demonstrated that protected activity "was a contributing factor" in a challenged personnel action. 42 U.S.C. 5851(b)(3)(C). The question presented is whether the Department, in determining whether a complainant has met that burden, may apply the burden-shifting framework established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, under which the complainant must show that it is more likely than not that the employer's articulated, legitimate reasons for the unfavorable employment action were a pretext for discrimination.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is not published in the *Federal Reporter*, but is *reprinted in* 148 Fed. Appx. 490. The decision of the Department of Labor's Administrative Review Board (Pet. App. 18a-47a) is unreported. The recommended decision of the administrative law judge (Pet. App. 61a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. A petition for rehearing was denied on January 10, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 211(a) of the Energy Reorganization Act of 1974 (ERA) (as amended) prohibits discrimination against employees in the nuclear energy industry who engage in certain protected activities. 42 U.S.C. 5851(a). The Secretary of Labor is responsible for investigating complaints of discrimination. After completion of an investigation, the Secretary either issues an order denying the complaint or finds discrimination and provides relief. 42 U.S.C. 5851(b)(2).

The Secretary may find discrimination "only if the complainant has demonstrated that [protected activity] * * * was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). Even if the complainant makes that required showing, the Secretary may not order relief "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]." 42 U.S.C. 5851(b)(3)(D).

Under the Secretary's regulations, either the complainant or the respondent may request a hearing before an Administrative Law Judge (ALJ), who issues a recommended decision. The ALJ's recommended decision is reviewable by the Department of Labor's Administrative Review Board (Board). 29 C.F.R. 24.4(d), 24.6, 24.7, 24.8(a). The Board's final decision is reviewable in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1); 29 C.F.R. 24.8. In reaching its decision, the Board is authorized to review the entire record and to make its own findings of fact. See 5 U.S.C. 557(b); *Trimmer* v. *United States Dep't of Labor*, 174 F.3d 1098, 1102 n.6 (10th Cir. 1999).

The court of appeals reviews the Board's findings under the substantial evidence standard. See *Stone & Webster Eng'g Corp.* v. *Herman*, 115 F.3d 1568, 1571 (11th Cir. 1997).

2. Petitioner is a former employee of the United States Enrichment Corporation (USEC). Pet. App. 4a. Petitioner worked at USEC's gaseous diffusion plant in Paducah, Kentucky. *Ibid.* In April 1999, petitioner transferred to a department responsible for developing training materials for mobile industrial equipment. *Id.* at 20a-21a. Petitioner's duties included developing training materials for powered industrial trucks. *Id.* at 5a-21a.

One of petitioner's projects related to a regulation issued by the Occupational Safety and Health Administration (OSHA) that was to become effective in December 1999. Pet. App. 5a. That regulation threatened to make USEC's training program for trucks non-compliant. *Ibid.* Petitioner filed a problem report in May 1998 to ensure that a tracking mechanism existed that would resolve deficiencies before the compliance date. *Ibid.* Thereafter, petitioner filed 13 problem reports relating to various deficiencies. *Ibid.*

Petitioner did not develop the training module in time to meet the December 1999 compliance date. Pet. App. 5a. In January 2000, petitioner requested an assignment to a different job. *Ibid.* In support of the request, petitioner stated that his lack of experience made the training department appear weak and led to difficulty communicating problems he perceived. *Ibid.* Petitioner also stated that there were "probably other personnel who would do a much better job." *Ibid.* The manager of the training department denied petitioner's request for a reassignment and instead assigned a more

experienced employee, Ed Craven, to work with petitioner. *Id.* at 5a-6a. When petitioner's performance was next evaluated, he received a "meets expectation" rating on four performance factors, but a "below goals/expectations" rating on the factor relating to job knowledge, initiative, and interpersonal skills. *Id.* at 6a. Petitioner challenged his assessment, but USEC's human resources department concluded that the assessment was justified. *Ibid.*

In February 2000, USEC announced a reduction in force. Pet. App. 6a. Management determined that one of the reductions would have to come from petitioner's division. *Ibid.* Petitioner and Craven were the only two employees in that division. *Ibid.* The managers unanimously rated petitioner considerably lower than Craven on a list of job ratings. *Ibid.* Accordingly, on July 5, 2000, USEC discharged petitioner. *Ibid.*

On December 21, 2000, petitioner filed a complaint with the Department of Labor, alleging that the discharge violated Section 211 of the ERA, 42 U.S.C. 5851. Pet. App. 6a. After an investigation, the Department of Labor found no discrimination. *Id.* at 6a-7a.

3. Petitioner then requested a hearing before an ALJ, who found that petitioner had been subjected to discrimination based on protected activity under Section 211 of the ERA and recommended a finding of discrimination. Pet. App. 61a-150a. The ALJ concluded that petitioner had established a prima facie case of discrimination, *id.* at 116a-121a, that the employer had failed to show by clear and convincing evidence that the alleged disparate treatment was motivated by a legitimate nondiscriminatory reason, *id.* at 121a-124a, and that petitioner had established that the company's asserted reasons for acting were a pretext for discrimination, *id.* at

124a-132a. The ALJ further determined that USEC had failed to establish by clear and convincing evidence that it would have taken the same action in the absence of discrimination. *Id.* at 133a-136a.

4. The Board reversed the ALJ's decision and denied petitioner's complaint. Pet. App. 18a-47a. The Board initially held that the ALJ had erred in requiring USEC to respond to the complainant's prima facie case with clear and convincing evidence that it would have taken the same action for legitimate reasons. *Id.* at 26a. The Board explained that such a burden "arises only if [petitioner] has proven by a preponderance of the evidence that [the employer] terminated his employment in part because of his protected activity." *Ibid.* In responding to petitioner's prima facie case, the Board stated, USEC's sole burden was to articulate a legitimate reason for terminating petitioner. *Id.* at 27a.

The Board assumed, without finding, that petitioner had engaged in protected activity. Pet. App. 28a. The Board concluded, however, that petitioner failed to establish that his protected activity was a contributing factor in USEC's decision to terminate his employment. *Id.* at 29a-30a.

In reaching that conclusion, the Board applied the methodology developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Under that methodology, once a complainant establishes a prima facie case, and the employer rebuts it, the complainant must prove that the employer's reason is a pretext and that the employer's decision was made at least in part because of the employee's protected activity. Pet. App. 29a-30a. In this case, the Board found that the employer had produced a legitimate reason for terminating petitioner: the other employee in petitioner's training divi-

sion (Craven) had "objectively better qualifications, training, and performance." *Id.* at 30a. The Board rejected as unpersuasive petitioner's attempts to show that the employer's explanation was a pretext for discrimination. *Id.* at 30a-46a. In particular, it found that USEC did not prevent petitioner from using available resources to complete his assignments, *id.* at 31a-33a, that USEC's assignment of Craven to assist petitioner was a legitimate business decision, *id.* at 33a-35a, that petitioner's mid-year evaluation fairly reflected his performance, *id.* at 35a-37a, that petitioner had failed to show that the officials who rated him below Craven had a negative attitude toward him because of his protected activities, *id.* at 37a-39a, and that petitioner failed to show he was rated below Craven because of protected activities, *id.* at 40a-45a.

5. The court of appeals upheld the Board's decision. Pet. App. 3a-17a. The court rejected petitioner's argument that the Board had erred by applying the Title VII burden-shifting framework. *Id.* at 9a-10a. The court reasoned that, although Section 211 of the ERA had its own burden-shifting standards, petitioner had not shown how the Board's use of Title VII "pretext analysis" adversely affected his case or was incompatible with Section 211. *Id.* at 10a. The court concluded that because substantial evidence supports the Board's determination that petitioner failed to establish by a preponderance of the evidence that retaliation for protected activity contributed to his termination, the asserted error was "at most a harmless one." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other

court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 16-19) that the Board contravened congressional intent by using a Title VII "pretext" analysis and that the Board's use of that analysis was not harmless error. Neither of those contentions is correct.

a. Under the Title VII framework, a plaintiff seeking to prove discrimination through circumstantial evidence must first establish a prima facie case, which creates a presumption of discrimination. See, *e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506 (1993). The employer then has the burden of producing a legitimate, nondiscriminatory explanation for its actions. *Id.* at 507. If the employer does so, the presumption disappears, and the plaintiff must establish discrimination by a preponderance of the evidence. *Id.* at 507-508, 520. A prima facie case, together with proof that the employer's explanation is a pretext, does not require a trier of fact to find discrimination, *id.* at 517-519, but permits it to do so. *Id.* at 511; *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-148 (2000). "It is not enough * * * to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Ctr.*, 509 U.S. at 519.

Petitioner contends (Pet. 12) that the Board could not use a Title VII analysis because Congress required a distinct standard that would make it easier for whistleblowers to prevail when it amended the ERA in 1992. See Energy Policy Act of 1992 (1992 Act), Pub. L. No. 102-486, § 2902, 106 Stat. 3123. Petitioner's argument overstates the effect of the 1992 amendment. While the amendment was intended to make it easier for an employee to prevail, it does not foreclose the use of pretext

analysis as an aid in determining whether there has been a violation of Section 211.

Before 1992, the ERA's employee protection provision had no burden of proof rules. See 42 U.S.C. 5851 (1988). The Department of Labor relied on Title VII burden-shifting principles together with mixed motive analysis to determine whether there was a violation of Section 5851. See, *e.g.*, *Dartey*, No. 82-ERA-2, 1983 WL 189787, at *3-*4 (Dep't of Labor Apr. 25, 1983). Under those principles, if the employee established a prima facie case, and the employer satisfied its burden of production, the Secretary would then examine evidence that the employer's stated reason was a pretext. Based on that analysis, the Secretary could conclude that the employer's reason was a pretext for discrimination and rule for the employee, or conclude that the employer was not motivated in whole or in part by protected activity and rule for the employer, or conclude that an employer acted out of mixed motives. *Id.* at *4. If the Secretary concluded that the employee had proven by a preponderance of the evidence that protected activity was a "motivating factor," the Department allowed the employer to escape liability by proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct. *Ibid.*

The 1992 amendments added 42 U.S.C. 5851(b)(3)(C) and (D) to the ERA. 1992 Act, § 2902, 106 Stat. 3123. Section 5851(b)(3)(C) requires an employee to prove that discrimination was a "contributing factor" to an adverse action, rather than a "motivating" factor. 42 U.S.C. 5851(b)(3)(C). The 1992 amendments do not change the preponderance of the evidence test that applied in deciding whether an employee has met his burden of proof. When the employee's evidence shows that protected

activity is a contributing factor, 42 U.S.C. 5851(b)(3)(D) requires the employer to prove that the same action would have been taken in the absence of discrimination by clear and convincing evidence rather than by a preponderance of the evidence, as was formerly the case. Because the 1992 amendments say nothing about how an employee may prove that protected activity was a contributing factor to an adverse action, the Board reasonably adhered to pre-1992 law on how a plaintiff could prove that protected activity was a motivating factor in such an action. See Pet. App. 27a (citing *Dartey, supra*); *Hasan* v. *United States Dep't of Labor*, 400 F.3d 1001, 1004 (7th Cir.) ("The parties agree that the same standard for establishing a prima facie case of retaliation that is used in employment discrimination statutes such as Title VII is appropriate in retaliation cases brought under the Energy Reorganization Act."), cert. denied, 126 S. Ct. 183 (2005).

Applying that methodology here, the Board determined that petitioner failed to bear his burden of proving that protected activity was a contributing factor to his termination. See Pet. App. 30a-46a. Because petitioner failed to satisfy that burden, there was no reason to address whether the employer could show that it would have taken the same action under the heightened "clear and convincing" evidence standard. And the Board and the court of appeals were right to reject the ALJ's importation of that standard into the Section 5851(b)(3)(C) "contributing factor" analysis for determining discrimination in the first place, where it does not belong.

b. In any event, as the court of appeals explained, even if the Board had erred in applying the Title VII framework, any such error would have been harmless.

However the burden-shifting scheme is formulated, the complainant must prove by a preponderance of the evidence that his protected activity contributed to his termination; otherwise, the burden never shifts to the employer to establish by clear and convincing evidence its same-decision defense. The Board, which is authorized to review the entire record and find its own facts, specifically found in this case that petitioner failed to prove that protected activity was a contributing factor in petitioner's termination. Pet. App. 30a. The court of appeals affirmed that finding as supported by substantial evidence. *Id.* at 10a. There is no reason for this Court to review that fact-bound question. See Sup. Ct. R. 10.

2. Contrary to petitioner's assertion (Pet. 11), the decision below is not a "departure" from decisions of other courts of appeals. It is fully consistent with the Seventh Circuit's decision in *Hasan*, 400 F.3d at 1004, which applied Title VII standards in determining whether an employee establishes a prima facie case of retaliation under the ERA. See *Dysert* v. *United States Sec'y of Labor*, 105 F.3d 607, 609 (11th Cir. 1997) (upholding DOL's interpretation of 42 U.S.C. 5851(b)(3)(C), as requiring an employee to prove by a preponderance of the evidence that protected activity was a contributing factor in an adverse action without discussing how an employee could meet that burden). No other case petitioner cites addressed the issue presented here, much less creates a circuit conflict.

In *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (1997), the Eleventh Circuit held that Section 211 requires an employee to persuade the Secretary that protected activity was a contributing factor in an adverse action and then, if the employee succeeds, allows an employer to prove by clear and convinc-

ing evidence that it would have taken the same action in the absence of protected activity. The court affirmed the Secretary's findings that the employee in that case met his burden of showing he had suffered retaliation for engaging in protected activity while the employer did not meet its burden of showing it would have taken the same action in any event. *Id.* at 1573-1576. *Stone & Webster* did not address the standards to be applied in deciding whether an employee meets his burden of showing that a protected activity was a contributing factor in the employer's adverse action.

Similarly, in *Trimmer* v. *United States Department of Labor*, 174 F.3d 1098 (1999), the Tenth Circuit held that "[o]nly if the complainant meets his burden [of proving by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an unfavorable employment decision] does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Id.* at 1102. Applying that analysis, the court affirmed the Secretary's finding that the complainant failed to prove an adverse employment action. *Id.* at 1103-1104. As in *Stone & Webster*, the court did not address the standards for determining whether a protected activity was a "contributing factor" in an adverse action under Section 211.

Petitioner also cites (Pet. 12) *Williams* v. *Administrative Review Board*, 376 F.3d 471, 476 (5th Cir. 2004). In that case, the court agreed with the parties that hostile work environment claims are cognizable under Section 211, held that Title VII standards applied in determining an employer's liability for supervisory harassment, and affirmed the Board findings of no harassment

or other discrimination. *Id.* at 476-480. The court said nothing about the question presented in this case.

Thus, none of the decisions relied on by petitioner addressed the question of how an employee may satisfy his burden of showing that his protected activity was a contributing factor in an adverse employment action. And, in any event, because the court of appeals in this case determined that any error in the Board's approach to that question would be harmless, this case is not an appropriate one in which to decide that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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